IN THE UTAH COURT OF APPEALS

STEVEN J. ONYSKO, an individual, Petitioner; v. UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY, and UTAH CAREER SERVICE REVIEW OFFICE, Respondents.	PRINCIPAL BRIEF OF PETITIONER STEVEN ONYSKO Case No. 20180984-CA Agency Decision No. 2010 CSRO/HO 147

Appeal from the State of Utah Career Service Review Office, Salt Lake County Hearing Officer Geoffrey Leonard

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Oral Argument Requested

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INTRODUCTION

Steven J. Onysko, Ph.D., P.E., appeals the Career Service Review Office (the "CSRO")'s decision upholding the termination of his nearly 20 year employment by the Utah Department of Environmental Quality ("DEQ") as a licensed professional engineer, Environmental Engineer III.

Nature and context of the dispute

After almost 20 years of successful employment as a professional engineer with the State of Utah,[1] DEQ issued Dr. Onysko a July 10, 2017 letter titled "Intent to Discipline – Dismissal for Just Cause and the Good of the Public Service" (the "Intent to Dismiss Letter").[2] That letter informed Dr. Onysko DEQ intended to terminate him based, in large part, on the results of a May 22, 2017 investigative report (the "Investigation Report")[3] created by the Department of Human Resource Management (the "DHRM"). Dr. Onysko did not receive a copy of the Investigation Report until six months later, after his termination.

On October 23, 2017 DEQ issued Dr. Onysko a letter titled "Final Agency Decision – Termination" (the "Termination Letter").[4] In that letter, DEQ expanded on

[1] Dr. Onysko has been a licensed professional engineer in various states for 40 years. He holds an engineering B.S. degree from Brown University, engineering M.S. degree from Cornell University, and engineering Ph.D. from the University of California Berkeley.
[2] The Intent to Dismiss Letter (R. 7-9) is attached hereto as Addendum "A."
[3] The Investigation Report (R. 826-34) is attached hereto as Addendum "B."
[4] The Termination Letter (R. 19-21) is attached hereto as Addendum "C."

the reasons it was terminating Dr. Onysko and also offered entirely new reasons, all without a copy of the Investigation Report. On October 30, 2017, Dr. Onysko filed a grievance regarding his termination.

Eventually, the CSRO held a R. 137-1-11 step 4 evidentiary hearing regarding Dr. Onysko's grievance, which lasted several days (the "Hearing"). Hearing Officer Geoffrey Leonard (the "Hearing Officer") issued a final decision on November 5, 2018 (the "CSRO Decision").[5] At several points in his discussion, the Hearing Officer compared Dr. Onysko's conduct at the Hearing, pro se, to the conduct for which DEQ allegedly terminated Dr. Onysko. After drawing this comparison, the Hearing Officer concluded that Dr. Onysko's conduct in the Hearing was evidence that Dr. Onysko committed similar conduct while working for DEQ a year before.

The Hearing Officer also disregarded several of the reasons for which DEQ terminated Dr. Onysko and relied on new reasons not identified in the Intent to Dismiss Letter of which Dr. Onysko had not received prior notice. Further, the Hearing Officer made several factual findings supported only by inadmissible hearsay.

Despite the fact that Dr. Onysko did not receive a copy of the Investigation Report until after he was terminated, the Hearing Officer also concluded Dr. Onysko received adequate pre-dismissal notice of all of the reasons for his termination. The Hearing

[5] The CSRO Decision (R. 4499-541) is attached hereto as Addendum "D."

Officer found, in the alternative, that even if Dr. Onysko did not receive adequate pre-dismissal notice, his post-termination notice and process were a sufficient replacement.

The Hearing Officer ultimately found Dr. Onysko's termination was supported by substantial evidence, proportionate to his alleged offenses, and consistent with other similarly situated employees.

Why Dr. Onysko should prevail

Dr. Onysko should prevail because he suffered substantial prejudice when the Hearing Officer erroneously applied/interpreted the law by: (1) finding Dr. Onysko had displayed certain conduct during his employment because he supposedly displayed similar conduct at the Hearing; (2) upholding Dr. Onysko's termination based on reasons other than those formally communicated to Dr. Onysko in the Intent to Dismiss Letter; (3) concluding Dr. Onysko received meaningful pre-termination-notice and, in the alternative, that Dr. Onysko's post-termination notice and process were a sufficient replacement; (4) basing some of his factual findings exclusively on inadmissible hearsay; and (5) deciding Dr. Onysko's termination was proportionate and consistent.

STATEMENT OF THE ISSUES

A. Did the Hearing Officer erroneously apply the law in finding Dr. Onysko had displayed certain conduct for which he was terminated because he supposedly displayed similar conduct at the Hearing, and, if so, was Dr. Onysko substantially prejudiced as a result?

Standard of review: Appellate courts examine the Hearing Officer's findings of fact to determine whether substantial evidence supported the allegations against the petitioner, review the Hearing Officer's application of rules for reasonableness and rationality, and grant relief if the petitioner was substantially prejudiced by the Hearing Officer's erroneous application or interpretation of the law. *See* *Burgess v. Dep't of Corr.*, 2017 UT App 186, ¶¶ 13-15, 405 P.3d 937; Utah Code Ann. § 63G-4-403(4).

Preservation: The Hearing Officer expressly ruled on this issue in the CSRO Decision. R. 4525-28.

B. Did the Hearing Officer erroneously apply the law by upholding Dr. Onysko's termination based on reasons other than those formally communicated to Dr. Onysko in the Intent to Dismiss Letter, and, if so, was Dr. Onysko substantially prejudiced as a result?

Standard of review: Appellate courts examine the Hearing Officer's findings of fact to determine whether substantial evidence supported the allegations against the petitioner, review the Hearing Officer's application of rules for reasonableness and rationality, and grant relief if the petitioner was substantially prejudiced by the Hearing Officer's erroneous application or interpretation of the law. *See* *Burgess*, 2017 UT App 186, ¶¶ 13-15; Utah Code Ann. § 63G-4-403(4).

Preservation: The Hearing Officer expressly ruled on this issue in the CSRO Decision. R. 4514-16.

C. Did the Hearing Officer erroneously interpret the law to conclude Dr. Onysko received meaningful pre-termination-notice and, in the alternative, that Dr. Onysko's post-termination notice and process were a sufficient replacement and, if so, was Dr. Onysko substantially prejudiced as a result?

Standard of review: Appellate courts examine the Hearing Officer's findings of fact to determine whether substantial evidence supported the allegations against the petitioner, review the Hearing Officer's application of rules for reasonableness and rationality, and grant relief if the petitioner was substantially prejudiced by the Hearing Officer's erroneous application or interpretation of the law. *See Burgess*, 2017 UT App 186, ¶¶ 13-15; Utah Code Ann. § 63G-4-403(4).

Preservation: The Hearing Officer expressly ruled on this issue in the CSRO Decision. R. 4514-16.

D. Did the Hearing Officer erroneously apply the law by basing some of his factual findings exclusively on inadmissible hearsay, and, if so, was Dr. Onysko substantially prejudiced as a result?

Standard of review: Appellate courts examine the Hearing Officer's findings of fact to determine whether substantial evidence supported the allegations against the petitioner, review the Hearing Officer's application of rules for reasonableness and rationality, and grant relief if the petitioner was substantially prejudiced by the Hearing

Officer's erroneous application or interpretation of the law. *See* *Burgess*, 2017 UT App 186, ¶¶ 13-15; Utah Code Ann. § 63G-4-403(4).

Preservation: The Hearing Officer expressly ruled on this issue in the CSRO Decision. R. 4499-541

E. Did the Hearing Officer erroneously apply by the law by concluding Dr. Onysko's termination was proportionate and consistent, and, if so, was Dr. Onysko substantially prejudiced as a result?

Standard of review: Appellate courts examine the Hearing Officer's findings of fact to determine whether substantial evidence supported the allegations against the petitioner, review the Hearing Officer's application of rules for reasonableness and rationality, and grant relief if the petitioner was substantially prejudiced by the Hearing Officer's erroneous application or interpretation of the law. *See* *Burgess*, 2017 UT App 186, ¶¶ 13-15; Utah Code Ann. § 63G-4-403(4).

Preservation: The Hearing Officer expressly ruled on this issue in the CSRO Decision. R. 4531-4536.

STATEMENT OF THE CASE

Facts and procedural history

In 1998, Dr. Onysko began working at DEQ as an Environmental Engineer. R. 4569, Exhibit Book #1, G-132; 4501. During his nearly 20-year employment, each of Dr. Onysko's performance evaluations rated him as either "Successful" or "Exceptional."

R. 4573, Exhibit Book #5, G-486; 4513. On July 12, 2006, DEQ issued Dr. Onysko a "Memorandum of Written Warning" (the "2006 Warning"). R. 4568, Exhibit Book, A-31; 4501.[6] Nearly two years later, DEQ issued Dr. Onysko a February 15, 2008 "Memorandum" that it characterized as another written warning (the "2008 Warning").[7] R. 4568, Exhibit Book, A-35; 4501.

On September 27, 2016, Dr. Onysko received another "successful" performance evaluation (the "2016 Evaluation"),[8] which also noted Dr. Onysko had room to improve in a certain area. R. 4568, Exhibit Book, A-39; 4502. Dr. Onysko expressed his disagreement with his performance evaluation in the "Employee Comment" section of the evaluation form. R. 4568, Exhibit Book, A-39; 4502-03. The single neutral comment aside, the 2016 Evaluation commended Dr. Onysko for being "very thorough and well documented," "exemplary," and "an excellent mentor to other engineers because of his knowledge, experience, and willingness to help." R. 4568, Exhibit Book, A-39. Further, it notes "staff has commented that every troubled water system in Utah should go through a Steve Onysko sanitary survey[.]" R. 4568, Exhibit Book, A-39.

On October 17, 2016, more than eight years after his last warning and only a few weeks after his "successful" 2016 Evaluation, DEQ issued Dr. Onysko another written

[6] The 2006 Warning did not prevent Dr. Onysko from receiving an overall "successful" performance evaluation for that time period. R. 4569, Exhibit Book #1, G-133.
[7] The 2008 Warning did not prevent Dr. Onysko from receiving an overall "exceptional" performance evaluation for that time period. R. 4569, Exhibit Book #1, G-136.
[8] The 2016 Evaluation (Exhibit A-39 in R. 4568) is attached hereto as Addendum "E."

warning (the "2016 Warning"). R. 4568, A-16; 4503. Without offering any detail or specific examples, the 2016 Warning criticized Dr. Onysko based on "numerous verbal and two written complaints." R. 4568, A-16. Further, the 2016 Warning listed six directives Dr. Onysko was to obey, many of which were unrelated to Dr. Onysko's prior conduct. For instance, the 2016 Warning directed Dr. Onysko to not threaten customers with delayed processing if they fail to produce items in his preferred format, even though no evidence exists showing Dr. Onysko ever engaged in such threatening conduct. R. 4568, A-16.

Then, DEQ issued Dr. Onysko a December 16, 2016 letter titled "Notice of Intent to Discipline-Written Reprimand" (the "Intent to Reprimand Letter"). R. 4568, Exhibit Book, A-11; 4504. The Intent to Reprimand Letter suffered from a lack of detail similar to the 2016 Warning, ambiguously referring to "an incident that occurred on Wednesday November 9, 2016, involving you and a non –[DEQ] employee in the MASOB building." R. 4568, Exhibit Book, A-11.[9] On January 13, 2017, DEQ gave Dr. Onysko a "Notice Imposing Discipline - Written Reprimand" (the "Written Reprimand"). R. 4572, G-364; 4505. The reasons for the Written Reprimand were the same as those listed in the Intent to Reprimand Letter and supplement thereto. R. 4572, G-364.

Based on a R. 477-16 abusive conduct complaint filed by Dr. Onysko's former supervisor, Ying-Ying Macauley, the DHRM investigated Dr. Onysko, which culminated

[9] DEQ supplemented the Intent to Reprimand Letter several weeks later. R. 4568, Exhibit Book, A-13.

in the creation of the Investigation Report. R. 826-34; 4506-07. In the Investigation Report, the DHRM made seven findings:

- That Dr. Onysko committed abusive conduct by telling an HR representative that he may file a criminal complaint regarding Ms. Macauley's issuance of the Intent to Reprimand Letter. R. 829-30.[10]
- That Dr. Onysko committed abusive conduct by filing an overbroad GRAMA request seeking Ms. Macauley's phone records and notifying Ms. Macauley of this request. R. 830.
- That Dr. Onysko committed abusive conduct by filing an unwarranted GRAMA request seeking Ms. Macauley's past sanitary survey reports and notifying Ms. Macauley of this request. R. 830-31.
- That Dr. Onysko committed abusive conduct by verbally threatening to expose negative information about Ms. Macauley if she did not remove the "room for improvement" comment from the 2016 Evaluation. R. 831-32.

[10] Inexplicably, the DHRM concluded this action amounted to abusive conduct against Macauley even though no evidence shows that Dr. Onysko ever attempted to inform Macauley of his possible filing of a criminal complaint. R. 829-30. For some unknown reason, the DHRM felt that Dr. Onysko's failure to inform Macauley of his actions took allegations five and six outside the realm of abusive conduct, but the same failure to inform Macauley did not have any impact on the first allegation. R. 826-34.

- That Dr. Onysko's submission of a complaint based on Ms. Macauley's treatment of a co-worker was *not* abusive conduct because there was no indication Dr. Onysko informed Ms. Macauley of this complaint. R. 832.
- That Dr. Onysko's comments to others that Ms. Macauley inappropriately revealed confidential information were *not* abusive conduct because there was no indication that Dr. Onysko informed Ms. Macauley of his comments. R. 832.
- That Dr. Onysko's comments that Ms. Macauley admonished a co-worker were *not* abusive conduct but rather self-defense over a differing interpretation of events. R. 832.

Dr. Onysko did not receive a copy of this report until after termination. R. 4514.

DEQ issued the Intent to Dismiss Letter on July 10, 2017. R. 7-9; 4507-08. In it, DEQ identified 14 reasons for intending to terminate Dr. Onysko's employment: (1) the 2006 Warning; (2) the 2008 Warning; (3) the 2016 Warning; (4) the Written Reprimand; (5) the Investigation Report; (6) Dr. Onysko's lack of improvement despite performance coaching and escalating discipline; (7) DEQ staff was spending unnecessary effort to excessively check themselves and document decisions to shield themselves against Dr. Onysko's intimidating threats; (8) Dr. Onysko's unnecessary project scrutiny and uncollaborative communication style increased project completion times and caused unwarranted administrative processing; (9) Dr. Onysko researched and criticized other

employees' projects and accused co-workers of incompetence; (10) Dr. Onysko threatened and followed through with complaints to the Department of Professional Licensing ("DOPL") against other engineers with whom he disagreed; (11) DEQ staff took on extra work because clients were frustrated by working with Dr. Onysko; (12) several co-workers expressed their preference of avoiding working with Dr. Onysko, or taking over his projects, because of his pattern of threatening to file DOPL complaints and scrutiny; (13) Dr. Onysko's uncollaborative style and refusal to use DEQ templates and common standard editing practices increased project completion times and caused unnecessary administrative processing; and (14) Dr. Onysko's conduct caused burdensome delays and damaged morale. R. 7-9.

Despite the numerous reasons listed, the Intent to Dismiss Letter lacks meaningful detail. For example, while it identifies the Investigation Report as one of the reasons, the Intent to Dismiss Letter it does not include or summarize that report.[11] R. 7-9; 4528-29. Similarly, it does not mention specific staff members, clients, or projects that Dr. Onysko's conduct supposedly impacted negatively. R. 7-9.

More than three months later, DEQ issued the Termination Letter. R. 19-21; 4508. That letter incorporated the reasons identified in the Intent to Dismiss Letter, but also identified three new reasons for Dr. Onysko's termination: (1) the three allegations

[11] On or about July 12, 2017, Dr. Onysko received a confusing and unspecific notice regarding the Investigation Report. R. 4573, Exhibit Book #5, G-430; 4514. According to the Hearing Officer, it "makes little sense and does not describe the alleged abusive behavior." R. 4514.

in the Investigation Report that DHRM found did *not* constitute abusive conduct evidenced Dr. Onysko's generally disruptive behavior and his unjustified, hostile, and ill feelings towards Ms. Macauley; (2) Dr. Onysko filed and pursued two meritless OSHA complaints; and (3) after Dr. Onysko was placed on administrative leave, DEQ morale and production improved. R. 19-21.

The Termination Letter, which terminated Dr. Onysko's employment, provided information (oftentimes incomplete) about many of the reasons for his termination to Dr. Onysko for the very first time. In that letter, Dr. Onysko learned that: (1) the DHRM had found when Dr. Onysko was speaking with a human resources employee, he threatened to bring a criminal complaint against Ms. Macauley regarding her issuance of the Intent to Reprimand Letter; (2) the DHRM found that Dr. Onysko filed overbroad and/or unnecessary GRAMA requests and left copies of such requests on Ms. Macauley's desk; (3) the DHRM had found that Dr. Onysko threatened to accuse Ms. Macauley of professional misconduct and malfeasance during a performance review meeting if she did not change her evaluation of his work; and (4) the DHRM had concluded that three other allegations did not constitute abusive conduct, even though the conduct had supposedly taken place. R. 19-21.

On October 30, 2017, Dr. Onysko grieved his termination. R. 4508. After that, he received a copy of the Investigation Report and eventually attended the Hearing before the Hearing Officer, pro se. R. 4514.

Disposition in the Hearing

The Hearing Officer ultimately determined Dr. Onysko's termination was supported by substantial evidence, Dr. Onysko's termination was proportionate and consistent, and DEQ had correctly applied all of the relevant laws. R. 4538-39.

In his decision, the Hearing Officer disregarded many of DEQ's reasons for terminating Dr. Onysko, including the 2006 Warning, the 2008 Warning, that Dr. Onysko spent too much time on projects, and Dr. Onysko's OSHA filings.[12] R. 4513; 4524; 4530.

The Hearing Offer also failed to consider or even mention many other of DEQ's reasons for the termination, including: (1) Dr. Onysko accused co-workers of incompetence; (2) staff took on extra work because clients were frustrated by working with Dr. Onysko; (3) co-workers expressed their preference of avoiding taking over Dr. Onysko's projects because of Dr. Onysko's pattern of threatening to file DOPL complaints and scrutiny; and (4) Dr. Onysko's refusal to use DEQ templates and common standard editing practices increased project completion times and caused unnecessary administrative processing.[13]

The Hearing Officer devoted several pages to comparing Dr. Onysko's conduct at the Hearing to the conduct for which DEQ allegedly terminated Dr. Onysko. R. 4525-28.

[12] Because the Hearing Officer did not rely on these reasons to support Dr. Onysko's termination, he will not address them further.
[13] Because the Hearing Officer did not rely on these reasons to support Dr. Onysko's termination, he will not address them further.

After drawing this comparison, the Hearing Officer concluded Dr. Onysko's "conduct throughout this proceeding also tends to corroborate the testimony of [DEQ's] witnesses and supports [DEQ's] assessment of [Dr. Onysko's] conduct and its effect on [DEQ]" and "tends to corroborate the testimony of [DEQ's] witnesses as to the disruptive, morale-breaking, and intimidating nature of [Dr. Onysko's] conduct." R. 4525; 4528.[14]

Additionally, the Hearing Officer relied on eight new reasons not identified in the Intent to Dismiss Letter and for which Dr. Onysko had not received notice prior to termination. These reasons include: (1) Dr. Onysko's purported conduct during the Hearing itself; (2) Dr. Onysko supposedly delivered a copy of his abusive conduct complaint and GRAMA requests to Ms. Macauley; (3) Dr. Onysko allegedly did not follow the six specific directions listed in the 2016 Warning; (4) Dr. Onysko's written comments in his 2016 Evaluation purportedly caused Ms. Macauley intimidation, humiliation, or unwarranted distress; (5) the fifth, sixth, and seventh allegations in the Investigation Report supposedly corroborated Dr. Onysko's misbehavior; (6) Dr. Onysko allegedly entered coworkers' project files needlessly; (7) Dr. Onysko purportedly told Michelle Watts "that he was going to file a criminal complaint regarding the manner in which the [Intent to Reprimand Letter] had been delivered to him;" and (8) productivity

[14] These findings are surprising considering the Hearing Officer's knowledge that Dr. Onysko was undergoing cognitive-impairing cancer therapy at the time of the Hearing. R. 1357-1363; 1788-1790; 4573, Exhibit Book #5, G-475.

and morale supposedly improved after Dr. Onysko left DEQ (collectively the "New Reasons"). R. 4505; 4513; 4522-25; 4530.

Moreover, despite the fact that Dr. Onysko did not receive a copy of the Investigation Report until after he was terminated and other notice issues, the Hearing Officer concluded Dr. Onysko received adequate pre-dismissal notice of all of the reasons for his termination. R. 4514-15. The Hearing Officer also found, in the alternative to his pre-dismissal notice ruling, that even if Dr. Onysko did not receive adequate pre-dismissal notice, his post-termination notice and process were a sufficient replacement. R. 4515-16. According to the Hearing Officer, "complete post-termination due process is sufficient to protect [Dr. Onysko's] due process rights to notice." R. 4516.

Further, the Hearing Officer made eight factual findings that were supported only by inadmissible hearsay. These findings include: (1) Nathan Lunstad supposedly expressed concern that Dr. Onysko might retaliate against him for his participation in the creation of the Investigation Report; (2) Dr. Onysko allegedly informed Ms. Macauley that he filed GRAMA requests by leaving copies of such requests on her desk; (3) two DEQ customers and several staff members purportedly complained about Dr. Onysko to Alan Matheson; (4) other DEQ engineers supposedly were on guard against Dr. Onysko and regularly took extra time to over-document their work, which resulted in a loss of productivity; (5) Dr. Onysko's coworkers allegedly were concerned they would be the next target of his supposedly inappropriate allegations of unprofessional conduct or

ethical violations; (6) Dr. Onysko's demeanor and conduct purportedly made it difficult for co-workers and customers to work collaboratively with him; (7) Matheson purportedly understood others' morale was low; and (8) Dr. Onysko had a history of filing DOPL complaints against other engineers with whom he disagreed (collectively the "Hearsay Reasons"). R. 4501, n.4; 4520; 4524-25; 4529.

Regarding proportionality and consistency, the Hearing Officer determined DEQ's decision to terminate Dr. Onysko "was neither disproportionate nor inconsistent" and was "rational, logical, and reasonable." R. 4534. During his analysis, the Hearing Offer concluded DEQ's "progression of discipline of Dr. Onysko, including termination, was consistent with its prior discipline of other employees exhibiting similar conduct." R. 4534-35.

SUMMARY OF ARGUMENT

This Court should overturn the CSRO Decision because Dr. Onysko was substantially prejudiced by the Hearing Officer's errors listed below. Specifically, after one disregards all of the improper reasons on which the Hearing Officer relied, only two reasons remain – the 2016 Warning and the Written Reprimand – and those two items do not justify any further discipline, let alone termination.

Improper propensity inference

Utah courts carefully avoid allowing a finder of fact to infer that, because a party committed a certain act at one time, it is likely that such party committed the same act at

a different time. This is because the evidence a factfinder considers should relate to the conduct at issue only. In this case, the Hearing Officer made the improper propensity inference that because Dr. Onysko supposedly acted a certain way during the Hearing itself, it is likely he acted that same way during the time at issue in the Hearing.

Reliance on New Reasons

Utah law required the Hearing Officer to consider only those allegations formally communicated to Dr. Onysko in the Intent to Dismiss Letter. Yet the Hearing Officer erred by relying on the eight New Reasons, of which Dr. Onysko received no pre-termination notice, to affirm Dr. Onysko's termination.

Lack of pretermination notice

Utah law entitles an employee in Dr. Onysko's former position to written notification of the specific reasons for a proposed dismissal or demotion, and time to reply to them before that discipline is imposed. However, there is no dispute that Dr. Onysko did not have pre-dismissal notice of the eight New Reasons discussed above.

In the alternative, the Hearing Officer found that even if Dr. Onysko did not receive adequate pre-dismissal notice, his post-termination notice and process were a sufficient replacement. But this finding is the exact opposite of established Utah law explaining that, even when complete post-termination process is available, due process still requires notice of the allegations, an explanation of the employer's evidence, and an opportunity to respond before termination.

Unsupported factual findings

The CRSO's findings of fact must be supported by a residuum of legally competent evidence, and therefore cannot be based solely on inadmissible hearsay. But the Hearing Officer erred by making the eight Hearsay Findings based only on inadmissible hearsay.

No proportionality or consistency

The Hearing Officer was required to determine whether the allegations against Dr. Onysko justified the termination sanction imposed. This inquiry breaks down into two sub-questions: first, was the sanction proportional; and second, was it consistent with previous sanctions imposed?

After setting aside the termination reasons disregarded or not addressed by the Hearing Officer, the improper propensity inference, the termination reasons of which Dr. Onysko had inadequate pretermination notice, and the termination reasons based solely on inadmissible hearsay, the Hearing Officer's conclusions regarding proportionality and consistency become unreasonable because only the 2016 Warning and Written Reprimand remain.

ARGUMENT

I. Dr. Onysko suffered substantial prejudice when the CSRO Hearing Officer erroneously applied the law to find Dr. Onysko had displayed conduct warranting termination because he supposedly displayed similar conduct at the Hearing.

The Hearing Officer found Dr. Onysko's conduct at the Hearing supported the conclusion Dr. Onysko had engaged in similar conduct during his tenure with DEQ and rendered DEQ witnesses more credible about Dr. Onysko's past behavior. R. 4525-4528. This conclusion is improper under Utah law and substantially prejudiced Dr. Onysko.

Courts universally avoid allowing a factfinder to infer that, because a party committed a certain act at one time, it is likely that such party committed the same act at a different time. *See* *State v. Nemier*, 148 P.2d 327, 329 (Utah 1944) ("It is universally recognized that the state may not prove other similar offenses committed by accused merely to . . . infer therefrom that he probably committed the crime charged."); MUJI 2d CR411, *available at* http://www.utcourts. gov/resources/muji ("Evidence has been presented that the defendant was previously convicted of a crime. . . . It is not evidence that the defendant is guilty of the crime(s) for which (he) (she) is now on trial.").[15]

[15] *See also* *United States v. Rodella*, 101 F. Supp. 3d 1075, 1109 (D.N.M. 2015) (noting the "forbidden inference" that "the person did X in the past, therefore . . . he probably did X this time, too"); *United States v. Smith*, 725 F.3d 340, 345 (3d Cir. 2013) ("[S]imply because one act was committed in the past does not mean that a like act was again committed[.]"); *State v. Vuley*, 2013 VT 9, ¶ 22, 70 A.3d 940 ("[I]t would be an [improper] inference based on propensity to say that, because a man has intentionally killed *a* wife, he is therefore more likely to have intentionally killed *this* wife[.]");*United States v. Miller*, 673 F.3d 688, 699 (7th Cir. 2012) (explaining the "forbidden propensity inference" of "[h]e intended to do it before . . . so he must have intended to do it again").

This rule exists because the evidence a factfinder considers should relate to the conduct at issue only. *See State v. Moton*, 749 P.2d 639, 644 (Utah 1988) ("One of the trial judge's duties is to regulate the admission of character evidence so as to exclude evidence which tends to distract the trier of fact from the main question of what actually happened on a particular occasion."); MUJI 2d CR411, *available at* http://www.utcourts.gov/resources/muji ("Keep in mind that the defendant is on trial for the crime(s) charged in this case, and for (that) (those) crime(s) only. You may not convict a person simply because you believe (he) (she) may have committed some other act(s) at another time.")

For example, this Court has stated "[t]he fact that one woman was raped ... has no tendency to prove that another woman [was raped]." *State v. Lowther*, 2015 UT App 180, ¶ 31, 356 P.3d 173, *opinion amended and superseded*, 2017 UT 34, 398 P.3d 1032 (citation omitted); *see also State v. Nelson-Waggoner*, 2000 UT 59, ¶ 24, 6 P.3d 1120 ("[E]vidence that a defendant raped others . . . has not been considered probative of whether a current victim was raped."). Similarly, courts do not allow factfinders to determine a defendant used drugs in a particular instance because that defendant used drugs in a separate instance. *See United States v. Gomez*, 763 F.3d 845, 863 (7th Cir. 2014) (explaining the improper inference that, because Gomez possessed cocaine at the time of his arrest, he must have been involved in a past cocaine-related crime); *United States v. Richardson*, 597 F. App'x 328, 333–34 (6th Cir. 2015) (noting the impropriety of the "once a drug dealer, always a drug dealer" reasoning).

In this case, the Hearing Officer made the exact inference precluded by the authority cited above, i.e. because Dr. Onysko supposedly acted hostile and contentious during the Hearing, it was more likely he was hostile and contentious while employed at DEQ. R. 4528 ("If Grievant habitually indulged in such conduct in a formal proceeding intended to determine whether or not he returns to work for Agency, it is likely that he did no less in his everyday work environment.").

The Hearing Officer then went even further by allowing this improper propensity inference to taint DEQ's other evidence. For instance, the Hearing Officer found Dr. Onysko's conduct during the Hearing: (1) "corroborate[s] the testimony of [DEQ's] witnesses and supports [DEQ's] assessment of Dr. Onysko's conduct and its effect on [DEQ];" (2)"demonstrates that [Dr. Onysko's] preferred method to address a difference of opinion is to threaten, intimidate, belittle, and otherwise attack the other party;" and (3) "tends to corroborate the testimony of [DEQ's] witnesses as to the disruptive, morale-breaking, and intimidating nature of [Dr. Onysko's] conduct." R. 4525; 4528.

The Hearing Officer's propensity inferences were improper. But because the Hearing Officer relied so heavily on Dr. Onysko's Hearing conduct in his decision, it is impossible to know what conclusion the Hearing Officer would have reached regarding DEQ's entire body of evidence without the improper propensity inferences. Because there is a reasonable likelihood the Hearing Officer's improper inferences affected the outcome of the Hearing, Dr. Onysko was substantially prejudiced by them. *See* *Foye v.*

Labor Comm'n, 2018 UT App 124, ¶ 31, 428 P.3d 26, *cert. denied*, 429 P.3d 461 (Utah 2018) (explaining that, under Utah Code Ann. § 63G-4-403(4), a person is substantially prejudiced by an error if there is a "reasonable likelihood that the error affected the outcome of the proceedings").

Based on the foregoing, this Court should overturn the CSRO because Dr. Onysko suffered substantial prejudice from the Hearing Officer's improper propensity inferences.

II. Dr. Onysko suffered substantial prejudice when the Hearing Officer erroneously applied the law to uphold Dr. Onysko's termination based on reasons not communicated to Dr. Onysko before his termination.

In sustaining Dr. Onysko's termination, the Hearing Officer expressly relied on reasons of which Dr. Onysko was given no notice prior to being terminated. R. 4505; 4513; 4522-25; 4530. Such reliance is expressly prohibited by Utah law and substantially prejudiced Dr. Onysko.

In Utah, "any statutorily-authorized appeal board reviewing an agency's termination decision must consider only those allegations formally communicated to the employee in the termination documentation provided to the employee." *Fierro v. Park City Mun. Corp.*, 2012 UT App 304, ¶ 31, 295 P.3d 696. If an appeal board "stray[s] from considering the charges contained in the [termination notice]," the Utah Court of Appeals "***must*** set aside the [appeal board's] decision." *Salt Lake City Corp. v. Gallegos*, 2016 UT App 122, ¶ 11, 377 P.3d 185 (citation omitted) (emphasis added). The Hearing Officer recognized this rule, stating that "[e]vidence not directly relating to [the] reasons for dismissal is not relevant to this case and shall be excluded." R. 2306-2317.

In this case, Dr. Onysko was entitled to written notification of the specific reasons for his proposed termination and time to respond to all of them before that discipline was imposed. *See* Utah Admin. Code R. 477-11-2(2)(a)-(b) (stating "[t]he agency head or designee shall notify the employee in writing of the specific reasons for the proposed dismissal or demotion" and "[t]he employee shall reply within five working days for the agency head or designee to consider the reply before discipline is imposed"); *Lucas v. Murray City Civil Serv. Comm'n*, 949 P.2d 746, 754 (Utah Ct. App. 1997) (concluding a discharged employee with a property interest in continued employment is entitled to "notice of the charges, an explanation of the employer's evidence, an opportunity to respond to the charges in 'something less' than a full evidentiary hearing before termination") (citation omitted). The only written notice of termination reasons Dr. Onysko received before being terminated was the Intent to Dismiss Letter. Thus, the Hearing Officer was limited to considering evidence respecting the reasons offered in the "four corners" of DEQ's Intent to Dismiss Letter. *See Gallegos*, 2016 UT App 122, ¶ 11.

In harmony with this restriction, the Hearing Officer could not consider reasons appearing for the first time in the Termination Letter because Dr. Onysko had no notice of those reasons or opportunity to respond to them before he was terminated. *See* R. 477-11-2(2)(b) ("The employee shall reply within five working days for the agency head or designee to consider the reply ***before discipline is imposed***.") (emphasis added); R. 4515 (discussing the supposed pre-termination "notice" the Termination Letter itself gave Dr.

Onysko). Likewise, the Hearing Officer could not consider reasons appearing for the first time in Dr. Onysko's pre-termination discussions with Mr. Matheson because DEQ had to present its reasons to Dr. Onysko in writing. *See* R. 477-11-2(2)(a) ("The agency head or designee shall notify the employee ***in writing*** of the specific reasons for the proposed dismissal or demotion.") (emphasis added); R. 4515 (discussing the supposed pre-termination "notice" given to Dr. Onysko during his discussions with Mr. Matheson).

In this case, the Hearing Officer based his decision on the eight New Reasons not identified in the Intent to Dismiss Letter and, thus, of which Dr. Onysko was given no pre-termination notice. First and foremost, the Hearing Officer relied on improper propensity inferences, as set forth above. *See* Argument § I, *above*. Because Dr. Onysko's conduct during the 2018 Hearing was not mentioned in the 2017 Intent to Dismiss Letter, the Hearing Officer erred in relying on that conduct in his decision. *See* R. 477-11-2(2)(a) (requiring "specific" written notice); *Gallegos*, 2016 UT App 122, ¶ 11 (requiring a termination notice to give the employee "clear notice of the allegations he should be prepared to address") (citation omitted).

Second, the Hearing Officer expressly found that "[o]n January 18, 2017, [Dr. Onysko] delivered a copy of his abusive conduct complaint to Ms. Macauley." R. 4505. Similarly, the Hearing Officer determined "it is more likely than not that" Dr. Onysko unnecessarily left copies of his GRAMA requests on Ms. Macauley's desk. R.4520. Because Dr. Onysko had no pre-termination notice of these allegations, the Hearing

officer erred in relying on them to support Dr. Onysko's termination. *See* R. 477-11-2(2)(a); *Gallegos*, 2016 UT App 122, ¶ 11.

Third, the Hearing Officer found Dr. Onysko "ultimately failed to follow" the "six specific directions" in the 2016 Warning. R. 4520. Because Dr. Onysko had no pre-termination notice of this allegation, the Hearing officer erred in making this finding and relying on it to support Dr. Onysko's termination. *See* R. 477-11-2(2)(a); *Gallegos*, 2016 UT App 122, ¶ 11.

Fourth, the Hearing Officer determined Dr. Onysko's written comments in his 2016 Evaluation caused Ms. Macauley "intimidation, humiliation, or unwarranted distress." R. 4520-21. While the Intent to Dismiss Letter identifies a "threat[]" to "a supervisor over a performance evaluation," such statement was a reference to Dr. Onysko's purported ***verbal*** threat to expose negative information about Ms. Macauley if she did not remove a criticism from the 2016 Evaluation.[16] R. 8.

Indeed, the Investigation Report, on which the allegation is based, reflects Ms. Macauley's contention "that during a meeting to discuss [Dr. Onysko's] performance in June 2016, [Dr. Onysko] threatened [her] specifically by stating that if she did not remove the line 'There is room for improvement regarding expectation #4' from his evaluation he would expose information[.]" R. 827. Correspondingly, the Termination Letter, which also relies on the Investigation Report, states "the investigation concluded

[16] Dr. Onysko only determined what supposed "threat" was referenced after receiving the Investigation Report and the Termination Letter.

that you had threatened to accuse your former supervisor of professional misconduct and malfeasance during a performance review meeting if she did not change her evaluation of your work." R. 20.

Accordingly, if the Intent to Dismiss Letter had given sufficient detail about Dr. Onysko's alleged threat, which it did not, it would have stated that the "threat" was verbal and not based on Dr. Onysko's written comments in the 2016 Evaluation itself.[17] Thus, the Hearing officer erred in basing his decision on Dr. Onysko's written comments. *See* R. 477-11-2(2)(a); *Gallegos*, 2016 UT App 122, ¶ 11.

Fifth, the Hearing Officer found that the conduct described in the fifth, sixth, and seventh allegations in the Investigation Report served as "corroboration of other evidence of [Dr. Onysko's] conduct." R. 4523. These allegations involved Dr. Onysko complaining about Ms. Macauley's treatment of a co-worker and telling others that Ms. Macauley revealed confidential information and had admonished a co-worker. R. 827. Again, the Intent to Dismiss Letter did not mention such conduct, so Dr. Onysko received no pre-termination notice of it. R. 7-9. Thus, the Hearing Officer erred in relying on these allegations to support Dr. Onysko's termination. *See* R. 477-11-2(2)(a); *Gallegos*, 2016 UT App 122, ¶ 11.

Sixth, the Hearing Officer found Dr. Onysko "entered coworkers' project files, despite not having review authority over those projects or any other legitimate need to do

[17] And a plain reading of such comments reflects no threat to Ms. Macauley or request that Ms. Macauley remove any of her comments. R. 4568, Exhibit Book, A-39.

so." R. 4525. While the Intent to Dismiss Letter asserts Dr. Onysko "researched and criticized other employee's projects," no reasonable person could glean from such statement that Dr. Onysko was being accused of entering his fellow engineers' project files without authorization. Thus, the Hearing officer erred in making this finding and relying on it to support Dr. Onysko's termination. *See* R. 477-11-2(2)(a); *Gallegos*, 2016 UT App 122, ¶ 11.[18]

Seventh, the Hearing Officer found Dr. Onysko told Ms. Watts "he was going to file a criminal complaint regarding the manner in which the [Intent to Reprimand Letter] had been delivered to him[.]" R. 4504-05. While the Intent to Dismiss Letter states Dr. Onysko "threatened to file criminal charges in response to standard management practices," that statement is not clear and specific as required. No reasonable person could glean from such statement that Dr. Onysko was being accused of threatening to file a criminal complaint about the manner in which he received the Intent to Reprimand Letter. Thus, the Hearing officer erred in making this finding and relying on it to support Dr. Onysko's termination. *See* R. 477-11-2(2)(a); *Gallegos*, 2016 UT App 122, ¶ 11.

Eighth, the Hearing Officer relied on the supposed "consensus of the witnesses . . . that [DEQ] productivity and morale improved after [Dr. Onysko] left [DEQ]." R. 4525.

[18] Even assuming this allegation was legitimate, DEQ protocols require persons in Dr. Onysko's position to routinely access and review public water system files, all of which constitute or constituted some individual coworker's project file. R. 4570, Exhibit Book #2, G-153 (explaining a surveyor "should review all water system reports, previous sanitary survey report and compliance history prior to conducting the survey")

Where alleged changes to DEQ's productivity and morale occurring after Dr. Onysko's absence were not mentioned in the Intent to Dismiss Letter, the Hearing Officer erred in making this finding and relying on it to support Dr. Onysko's termination. *See* R. 477-11-2(2)(a); *Gallegos*, 2016 UT App 122, ¶ 11.

It is impossible to know how the parties would have acted if Mr. Onysko had received the pre-termination notice to which he was entitled. Indeed, if Mr. Onysko had been able to respond to all of DEQ's issues with him prior to DEQ's final decision, there is at least a reasonable likelihood DEQ have chosen a path that did not involve terminating Dr. Onysko. *See Foye*, 2018 UT App 124, ¶ 31.

Based on the foregoing, this Court should overturn the CSRO because Dr. Onysko suffered substantial prejudice from the Hearing Officer's reliance on the New Reasons for which Dr. Onysko received no pre-termination notice.

III. Dr. Onysko suffered substantial prejudice when the Hearing Officer erroneously interpreted the law to conclude Dr. Onysko received meaningful pre-termination-notice and, in the alternative, that his post-termination notice and process were a sufficient replacement.

The Hearing Offer determined Dr. Onysko received adequate pre-termination-notice of the reasons for termination and, even if he did not, the post-termination process Dr. Onysko received was an appropriate substitute. R. 4515-16. But the first determination is verifiably false and the second determination is an incorrect statement of Utah law.

As explained previously, Utah law entitled Dr. Onysko to clear written notification of the specific reasons for his proposed termination before that discipline was imposed. *See* Argument § II, above. Yet as discussed above, Dr. Onysko did not receive written, clear, and specific pre-termination notice of the New Reasons on which the Hearing Officer relied to uphold his termination. *See id.* Thus, the Hearing Officer's conclusion that Dr. Onysko received proper "notifications of the reasons for [DEQ's] decision to terminate [his] employment" is erroneous. R. 4514.

In the alternative, the Hearing Officer relied on *Cleveland Board of Education v. Loudermill*, 470 U.S.532, 547-48 (1985) and *Lucas*, 949 P.2d at 754 to conclude "[c]omplete post-termination due process is sufficient to protect [Dr. Onysko's] due process rights to notice." R. 4516. But such conclusion is the exact opposite of what *Lucas* holds.

The *Lucas* case arose when Murray City terminated Officer Edward Lucas for dishonesty, excessive force, improper search techniques, and conduct unbecoming an officer. *See* 949 P.2d at 750. The Civil Service Commission affirmed Lucas' termination and Lucas appealed. *See id.* 751.

This Court began with determining what process was due Lucas in his termination procedures. *See id.* 753. First, it noted the "constitutional guarantee" that "a deprivation of any significant property interest 'be ***preceded*** by notice and opportunity for hearing appropriate to the nature of the case.'" *Id.* (citation omitted) (emphasis in original).

Then, relying on *Loudermill*, this Court concluded due process entitled Lucas to: (1) "notice of the charges;" (2) "an explanation of the employer's evidence," (3) "an opportunity to respond to the charges in 'something less' than a full evidentiary hearing before termination;" and (4) "a full post-termination hearing 'at a meaningful time.'" *Id.* 754; *see also Hollenbach v. Salt Lake City Civil Serv. Comm'n*, 2015 UT App 116, ¶ 8, 349 P.3d 791.

In sum, even when an employee receives a full post-termination hearing at a meaningful time, that employee is still entitled to notice of all the employer's allegations, an explanation of the employer's evidence, and an opportunity to respond, all prior to termination. *See id.* This comports with R. 477-11-2(2), which requires written and specific notice before discipline is imposed. *See* 477-11-2(2)(a)-(b). Accordingly, the Hearing Officer erred in relying on *Lucas* and *Loudermill* to conclude "[c]omplete post-termination due process" resolved any deficiency in Dr. Onysko's pretermination notice. R. 4516.

Based on the foregoing, this Court should overturn the CSRO because Dr. Onysko suffered substantial prejudice when the Hearing Officer concluded Dr. Onysko received meaningful pre-termination notice and, in the alternative, that his post-termination process was a sufficient replacement. *See Foye*, 2018 UT App 124, ¶ 31.

IV. Dr. Onysko suffered substantial prejudice when the Hearing Officer erroneously applied the law by basing some of his factual findings exclusively on inadmissible hearsay.

In affirming Dr. Onysko's termination, the Hearing Officer made several findings and conclusions based exclusively on inadmissible hearsay, which violates Utah law. R. 4501, n.4; 4520; 4524-25; 4529.

A CSRO hearing officer's determinations must be supported by a residuum of legally competent evidence and, thus, cannot be based solely on inadmissible hearsay. *See* *InnoSys, Inc. v. Dep't of Workforce Servs., Workforce Appeals Bd.*, 2011 UT App 169, ¶ 9, 257 P.3d 489; *W. Valley City v. Coyle*, 2016 UT App 149, ¶ 20, 380 P.3d 327. Consequently, a CSRO hearing officer cannot make a finding solely based on testimony by a person who is merely acting as a conduit to relay the personal knowledge or observations of another. *See* *State v. McNeil*, 2013 UT App 134, ¶ 44, 302 P.3d 844, *aff'd*, 2016 UT 3, 365 P.3d 699 ("Hearsay is generally inadmissible because the witness 'is acting as a conduit to relay' the personal knowledge or observations of others."); Utah R. Evid. 801, *et seq.* (defining hearsay); Utah R. Evid. 602 (requiring all non-expert witnesses to testify based on personal knowledge only).

The foregoing prohibition notwithstanding, the Hearing Officer made the eight Hearsay Findings based exclusively on inadmissible hearsay. First, the Hearing Officer found Nathan Lunstad "expressed concern that [Dr. Onysko] might retaliate against him for his participation in [the creation of the Investigation Report]." R. 4501, n.4. However, Lunstad never offered testimony, and the Hearing Officer's finding was based

solely on Bryan Embley's statement in the Investigative Report regarding what Lunstad supposedly told him. R. 828-29. The Hearing Officer erred in relying on this inadmissible hearsay. *See InnoSys*, 2011 UT App 169, ¶ 9; *McNeil*, 2013 UT App 134, ¶ 44.

Second, the Hearing Officer found Dr. Onysko left copies of GRAMA requests he had filed on Ms. Macauley's desk. R. 4518. But neither Dr. Onysko nor Ms. Macauley testified as such.[19] R. 4519. Rather, the Hearing Officer's finding was based exclusively on Mr. Embley's testimony about what Ms. Macauley supposedly told him. R. 4564, 1662:10-1663:4. The Hearing Officer's reliance on inadmissible hearsay was error. *See InnoSys*, 2011 UT App 169, ¶ 9; *McNeil*, 2013 UT App 134, ¶ 44.[20]

Third, the Hearing Officer relied on Mr. Matheson's testimony that he received complaints about Dr. Onysko from "two [DEQ] customers" and "several staff members." R. 4524, 4529. But no such customers or staff members testified about submitted complaints. Thus, the Hearing Officer erred in relying on Mr. Matheson's testimony about supposed complaints because Mr. Matheson acted as a conduit to relay customers' and staff members' personal knowledge. R. 4567, September 10, 2018 transcript, 932:

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[19] To the extent the Hearing Officer criticized Dr. Onysko for failing to address this desk issue in his own testimony, such criticism is inappropriate in light of the Hearing Officer's independent duty to gather the relevant facts. *See Nelson v. Dep't of Employment Sec.*, 801 P.2d 158, 163 (Utah Ct. App. 1990) ("[W]here one party in an administrative hearing is not represented by counsel, . . . the officer conducting the hearing has 'an affirmative duty to elicit all relevant facts, including those favorable and unfavorable to the party that is not represented.'") (citation omitted); R. 4519.

[20] This finding is also problematic for the reasons discussed in Argument § II above.

16-18, 956:10-11, 957:6-8, 1051:11-1053:13; *see also* *InnoSys*, 2011 UT App 169, ¶ 9; *McNeil*, 2013 UT App 134, ¶ 44.

Fourth, the Hearing Officer concluded "[o]ther [DEQ] engineers were 'on guard' against Dr. Onysko and regularly took extra time to over-document their work, resulting in a loss of DEQ productivity." R. 4524. But this finding was based solely on Ms. Macauley's testimony, because none of supposedly "on guard" engineers testified. R. 4567, July 17, 2018 transcript, 38:21-139:20, 246:22-24. Thus, the Hearing Officer erred in making findings about the mental state of other DEQ engineers of which Ms. Macauley had no personal knowledge. *See* *InnoSys*, 2011 UT App 169, ¶ 9; *McNeil*, 2013 UT App 134, ¶ 44.

Fifth, the Hearing Officer concluded Dr. Onysko's "[c]oworkers were concerned that they would be the next target of [Dr. Onysko's] allegations of unprofessional conduct or violation of the professional engineers' code of ethics." R. 4525. But none of Dr. Onysko's coworkers so testified. Once again, this testimony was offered by Ms. Macauley, who had no personal knowledge of the mental states of other DEQ co-workers. R. 4567, July 17, 2018 transcript, 248:7-15; *see also* *InnoSys*, 2011 UT App 169, ¶ 9; *McNeil*, 2013 UT App 134, ¶ 44.

Sixth, the Hearing Officer concluded Dr. Onysko's "demeanor and conduct purportedly made it difficult for co-workers and customers to work collaboratively with him." R. 4525. But, as explained before, none of these alleged coworkers or customers

testified. Rather, this testimony was offered by Ms. Owens. R. 4567, July 17, 2018 transcript, 729:3-7. The Hearing Officer erred in making findings about coworkers' and customers' experiences because Ms. Owens acted as a conduit to relay those workers' and customers' personal knowledge. *See InnoSys*, 2011 UT App 169, ¶ 9; 2013 UT App 134, ¶ 44.

Seventh, the Hearing Officer relied on Mr. Matheson's testimony that DEQ "morale was low" because of Dr. Onysko. R. 4529. However, not a single witness testified that his or her morale was low because of Dr. Onysko. Thus, the Hearing Officer erred in relying on Mr. Matheson's testimony about others' morale because Mr. Matheson acted as a conduit to relay the personal knowledge of others. R. 4567, September 10, 2018 transcript, 894:13-20; *InnoSys*, 2011 UT App 169, ¶ 9; 2013 UT App 134, ¶ 44.

Eighth, the Hearing Officer concluded Dr. Onysko "had a history of filing, or threatening to file, actions against individuals with whom he disagreed or against their professional licenses." R. 4519. But only one person, Ms. Macauley, actually testified regarding Dr. Onysko's filing of a DOPL complaint and no evidence was introduced as to the propriety of that complaint. R. 4567, July 17, 2018 transcript, 257: 23-258:16, 260:23-261: 4, 729:3-7, 811:2-6. The only evidence of other complaints was hearsay without detail. *See id.* Thus, the Hearing Officer erred in making findings about a "history" of filings against many "individuals with whom [Dr. Onysko] disagreed" based

only on a singular filing that may have been entirely appropriate. *See InnoSys*, 2011 UT App 169, ¶ 9; 2013 UT App 134, ¶ 44.

Based on the foregoing, this Court should overturn the CSRO because Dr. Onysko suffered substantial prejudice from the Hearing Officer's improper reliance on inadmissible hearsay to make the Hearsay Findings. *See Foye*, 2018 UT App 124, ¶ 31.

V. Dr. Onysko suffered substantial prejudice when the Hearing Officer erroneously applied the law to conclude Dr. Onysko's termination was proportionate and consistent.

The Hearing Officer concluded Dr. Onysko's termination was proportional to his alleged misconduct and consistent with how DEQ had disciplined others. R. 4531-4536. Those conclusions were erroneous.

The Hearing Officer was required to decide "whether the agency's decision, including any disciplinary sanctions imposed, is excessive, disproportionate or otherwise constitutes an abuse of discretion." Utah Admin. Code R. 137-1-21(3)(b). Courts have divided this inquiry "into two prongs: (1) Is the sanction 'proportional'? and (2) Is the sanction consistent with previous sanctions imposed by the department pursuant to its own policies?" *Burgess*, 2017 UT App 186, ¶ 35 (citation omitted).[21]

Burgess arose when the Utah Department of Corrections (the "Department") terminated Burgess for public intoxication, dishonesty, discrediting himself, and poor

[21] Regarding the second prong, a punishment is inconsistent if there is "some meaningful disparity of treatment between [the employee] and other similarly situated employees." *Burgess*, 2017 UT App 186, ¶ 49.

judgment. *See* 2017 UT App 186, ¶ 8. After a step 4 hearing, the CSRO upheld the termination, but found "substantial evidence does not support the conclusion that [Burgess] was publically intoxicated." *Id*. ¶ 10. Burgess appealed. *See id*.

This Court agreed with the CSRO that substantial evidence did not support the conclusion that Burgess was publicly intoxicated, but substantial evidence did support the conclusion that Burgess was dishonest, discredited himself, and exercised poor judgment**.** *See id*. ¶¶ 21, 29, 33. However, this Court disagreed with the CSRO's determination that the punishment Burgess received for his offenses (termination) was proportionate and consistent.

Specifically, this Court recognized the public intoxication allegation against Burgess "played a significant role" in the Department's termination decision. *Id*. ¶ 41. Setting aside such allegation, the remaining misconduct was not proportionate to the severe sanction of termination, especially in light of Burgess' exemplary service record. *See id*. ¶ 48. Similarly, this Court determined termination was not consistent with how the Department had disciplined others for merely exercising poor judgment. *See id*. ¶ 54.

As was the case in *Burgess*, Dr. Onysko's termination becomes disproportionate and inconsistent after disregarding all of the Hearing Officer's improper findings and conclusions. Dr. Onysko is urging this Court to disregard or set aside: (1) the improper propensity inference, (2) the ten termination reasons the Hearing Officer either expressly disregarded or did not address, (3) the eight New Reasons for which Dr. Onysko received

no pre-termination notice, and (4) the eight Hearsay Findings based exclusively on inadmissible hearsay. With these improper reasons removed from consideration, the only remaining reasons on which the Hearing Officer relied are the 2016 Warning and the Written Reprimand, neither of which justify punishment beyond their own existence.

Moreover, Dr. Onysko had an exemplary 20-year service record of exclusively "Successful" or "Exceptional" ratings, and Dr. Onysko was not terminated due to his technical abilities. Rather, the reasons for Dr. Onysko's termination related generally to his people skills, i.e. his demeanor, communication style, and way of exercising his rights (such as seeking information under GRAMA). R. 4530 ("[DEQ]'s allegations go not to what Dr. Onysko] did, but the manner in which he did it."). Such differences of opinion regarding Dr. Onysko's people skills do not warrant the harsh remedy of termination. *See* *Burgess*, 2017 UT App 186, ¶ 54 ("If a penalty is so harsh as to constitute an abuse, rather than an exercise of discretion, it cannot be allowed to stand.") (citation omitted).

Beyond proportionality, Dr. Onysko's termination is not consistent with how DEQ treated others who were also accused of people skill issues as opposed to technical inability. For example, one employee ("Employee 7") directed loud and inappropriate language to a coworker while throwing a ceramic mug against a cabinet so hard that it broke. R. 4568, Exhibit Binder, A-40, DEQ000300. Employee 7 received only a written reprimand even though he had received a written warning less than a year before concerning an inappropriate email to a reporter and a "scathing" email to a coworker.

See id. Another employee ("Employee 11") used sexually explicit language during a phone call at work that was loud enough for others to hear and discussed inappropriate personal topics with co-workers that made them feel uncomfortable. R. 4568, Exhibit Binder, A-40, DEQ000311-12. Employee 11 received only a written warning, notwithstanding a verbal warning for similar conduct three months earlier. *See id.* Finally, "Employee 2" engaged in unprofessional, argumentative, and rude conduct during a conference call with a customer and a supervisor. R. 4568, Exhibit Binder, A-40, DEQ000287. Employee 2 was allowed to retire in lieu of termination, despite a previous reprimand and a previous suspension. R. 4568, Exhibit Binder, A-40, DEQ000283.[22]

Based on the foregoing, this Court should overturn the CSRO because Dr. Onysko suffered substantial prejudice from the Hearing Officer's erroneous determination that his termination was proportionate and consistent. *See Foye*, 2018 UT App 124, ¶ 31.

CONCLUSION

In sum, this Court should overturn the CSRO Decision because Dr. Onysko was substantially prejudiced by the Hearing Officer's errors discussed above. Further, this Court should order Dr. Onysko's reinstatement with back pay, or, in the alternative,

[22] While the conduct was not similar, it is worth noting Dr. Onysko was terminated even though an employee who "inappropriately touched a co-worker's buttocks and kissed her on the lips" was allowed to resign. R. 4568, Exhibit Binder, A-40, DEQ000283, 291.

remand. *See* Utah Code Ann. § 63G-4-404(1)(b) (allowing this Court to "order agency action" and "modify agency action").

DATED: March 28, 2019.

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Attorneys for Steven J. Onysko

CERTIFICATE OF COMPLIANCE

Dr. Onysko certifies this brief complies with Utah R. App. P. 21 and 24(g).

DATED: March 28, 2019.

KESLER & RUST

/s/ J. Adam Knorr

_____

RYAN B. HANCEY
J. ADAM KNORR
Attorneys for Steven J. Onysko

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered two true and correct copies of the foregoing **PRINCIPAL BRIEF OF PETITIONER STEVEN ONYSKO**, by U.S. Mail on March 29, 2019 to:

Peggy Stone
160 East 300 South, Sixth Floor
P.O. Box. 140856
Salt Lake City, UT 84114-0856

Six copies via hand delivery on March 29, 2019 to:

Utah Court of Appeals
450 South State Street, 5th Floor
Salt Lake City, UT 84114-0230

Via email on March 29, 2019 to:

The Utah Court of Appeals: courtofappeals@utcourts.gov

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Annette Morgan, Legal Assistant: amorgan@utah.gov

/s/ Mckenzie Ujhely

ADDENDUM A

Exhibit 2

State of Utah

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

Department of
Environmental Quality

Alan Matheson
Executive Director

Brad T Johnson
Deputy Director

L. Scott Baird
Deputy Director

July 10, 2017

Steven J. Onysko
Enviornmental Engineer III

RE: Intent to Discipline – Dismissal for Just Cause and the Good of the Public Service

Mr. Onysko:

After having reviewed information submitted to me by Department of Human Resource Management (DHRM), and having considered the discretionary factors in DHRM Rules R477-11, it is my intent that you be dismissed for just cause and the good of the public service from your position as Environmental Engineer III with the Department of Environmental Quality.

This intent and my recommendation to the Executive Director are based on the following information:

You received written warnings in 2006 and 2008, for engaging in conduct that was disruptive to the workplace, damaging to morale, and unprofessional.

On October 17, 2016, you received a Written Warning due to complaints your supervisor received from Department of Environmental Quality (DEQ) clients regarding your harassing and abusive communications with them. Moreover, because of your inappropriate and officious scrutiny of projects these clients felt that they could not work with you collaboratively or efficiently. Such actions not only caused an undue burden to Division clients, it also discredited the Division. As a DEQ employee, you represent the Department in your interactions with others. Your unprofessional behavior damaged the reputation of the Department and your co-workers.

On December 16, 2016, you received a Written Reprimand for violating the DEQ Code of Conduct, because of your unprofessional interactions wherein you lost your temper and yelled at another DEQ employee, not assigned to the Division, causing anxiety and concern.

On June 12, 2017, an independent investigation was completed by DHRM regarding an abusive conduct complaint against you. The findings of the abusive conduct investigation were substantiated. This investigation substantiated that you used the normally unobjectionable activities

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www.deq.utah.gov

of filing GRAMA requests to intentionally intimidate and cause unwarranted distress to a co-worker who is also your supervisor. The investigation also substantiated that you threatened to file criminal charges in response to standard management practices, and that you threatened a supervisor over a performance evaluation.

Importantly, in reaching their determination that you had engaged in abusive conduct, the investigators noted a consistent and troubling pattern of using otherwise unobjectionable activities like filing GRAMA requests and complaints, administrative or otherwise, to intimidate or distress co-workers as well as management. Such conduct is not conducive to a professional work environment and fails to advance the agency's mission.

The letters of warning and reprimand were issued in a genuine effort to assist you in modifying your behavior so that you could successfully carry out the mission and vision of the Division. In addition, I have had multiple conversations with you between February 2017 and June 2017, discussing the negative impact your conduct has had on co-workers, DEQ clients, and the Division's ability to carry out its mission and objectives. Despite performance coaching and escalating disciplinary actions, your behavior has not improved.

Your misconduct is also disruptive to the workplace. It has resulted in staff spending unnecessary effort to excessively check, re-check and document decisions in an effort to shield themselves against your intimidating threats. Your unnecessary project scrutiny and your uncollaborative communication style has increased project completion times and caused unwarranted administrative processing. This has caused unnecessary and burdensome delays because you have repeatedly researched and criticized other employee's projects and accused co-workers of incompetence. You have repeatedly threatened and have followed through with complaints to the Department of Professional Licensing (DOPL) against other engineers with whom you disagree. Because clients have expressed their frustration in working with you, due to the difficulties in communicating and working with you, other staff have had to take on extra workload. Several co-workers have expressed their preference of avoiding working with you or being assigned to take over your projects out of fear of your pattern of threatening to file complaints with DOPL or having their work scrutinized by you. Your uncollaborative style and refusal to use Division templates and common standard editing practices have increased project completion times and caused unnecessary administrative processing. Overall, these have caused burdensome delays in Division processes and damage to the morale within the Division.

Management and employees are deserving of a workplace that is respectful to all and is free from intimidation, humiliation, and unwarranted distress. Your misconduct is in violation of DHRM Rules R477-16 Abusive Conduct Prevention and DEQ Policy 480-04 Employee Code of Conduct Policy which states:

1. Employees shall demonstrate support of the mission, vision and values of the Department. They shall abide by the administrative laws, rules, workplace policies and procedures that govern their work or professional activities.

3. Employees shall provide quality customer service to the public and internal customers. Quality customer service means:
   a. Communicating appropriately through written and spoken words and body language, identifying, understanding, and anticipating the needs of your customers by being sensitive to cultural differences, physical disabilities, knowing their time requirements, and being attentive;
   b. Instilling trust and confidence by treating customers with fairness, respect and courtesy, making them feel welcome and important, listening, and communicating clearly;
   c. Producing high-quality, timely, and relevant work product.

8. Employees shall not cause unnecessary disruption to their co-workers or to the workplace.

9. Employees shall not intimidate, use physical harm or threats of physical harm against co-workers, management, or the public at any time.

This disciplinary action is taken in accordance with DHRM Rules R477-11-1(1) for noncompliance with DHRM Rules, agency policies, just causes, and failure to advance the good of the public service.

If you wish to be heard on this intent, you have five (5) working days from your receipt of this letter to submit a written response and/or request a meeting with Executive Director Alan Matheson. You may call Jenny Potter at (801) 536-0095 to make an appointment.

Should you choose not to respond, or if your response is not received within five (5) working days from your receipt of this letter you will be deemed to have waived your right to be heard, and Mr. Matheson will make a final decision based on the information provided to him by me.

Sincerely,

Marie E. Owens, P.E
Director, Division of Drinking Water

Employee Signature

7/10/17
Date

I have received a copy of this letter.

cc: Personnel File

ADDENDUM B

Department of Human Resource Management
Investigation Report
May 22, 2017

I. Background Information

A. Issue:	Was the complainant subject to abusive conduct in violation of DHRM Rule R477-16?
B. Date of Complaint	January 18, 2017
C. Investigators:	Cathy Lewis, HR Specialist, DHRM, DWS Field Office Bryan Embley, HR Specialist, DHRM
D. Complainant:	Ying· Ying Macauley, Engineering Manager I, DEQ
E. Accused:	Steven Onysko, Environmental Engineer III, DEQ
F. Witnesses:	Marie Owens, Director, Division of Drinking Water, DEQ David Hansen, Environmental Scientist III, DEQ Bernie Clark, Environmental Scientist III, DEQ Nathan Lunstad, Environmental Engineer III, DEQ Nagendra Dev, Environmental Engineer III, DEQ Michelle Watts, HR Specialist, DHRM Dana Powers, HR Director, DHRM Bob Thompson, Labor Relations Director, DHRM

II. Background

Ms. Macauley, hereafter Complainant, has worked as an Engineering Manager for more than 10 years with the Department of Environmental Quality. In January 2017, Mr. Onysko filed an abusive conduct claim against Complainant. On April 12, 2017, an investigation found Mr. Onysko's claims to be unsubstantiated. Complainant now brings her complaint against Mr. Onysko alleging that Mr. Onysko engaged in abusive conduct towards her.

III. Summary of Allegations

A. Allegation 1: Complainant alleges that following receipt of an *Intent to Discipline* document on December 16, 2016, Mr. Onysko (Accused) told an HR representative that he may file a criminal complaint with the police regarding Complainant's issuance of the document. At the time the *Intent* was issued, Complainant was aware that Accused had made criminal complaints to the Wasatch and Summit County Sherriff's offices in 2016 over a working disagreement with an employee of the Jordanelle Special Service District and an employee of an independent consulting firm.

B. Allegation 2: Complainant alleges that following issuance of a Written Warning to Accused in October 2016, Accused filed six GRAMA requests for all of Complainant's phone records for a six month period. His GRAMA requests were not limited to the issues in the Written Warning but "in an effort to intimidate and harass (her]" included all her phone calls. Complainant also said that Accused left a copy of the GRAMA requests on her desk.

C.Allegation 3: Continuing this conduct, Complainant alleges that following issuance of the *Intent* to *Discipline* in December 2016, Accused made a GRAMA request for all of the sanitary survey reports that Complainant has done in the past She explains that there is no possible work purpose in doing so because the relevance of a report is determined by geography, not the identity of the surveyor. Complainant also said that Accused left a copy of the GRAMA request on her desk. Complainant believes Accused made the request with intent to harass and intimidate her.

D. Allegation 4: Complainant alleges that during a meeting to discuss Accused's performance in June 2016, Accused threatened Complainant specifically by stating that if she did not remove the line "There is room for improvement regarding expectation #4" from his evaluation he would expose information showing that Complainant had improperly monitored other Division of Drinking (DDW) review engineers.

E. **Allegation 5**: Complainant alleges that on April 7 ,2017, Accused submitted a complaint to another manager about Complainant's treatment of a co-worker during a meeting on April 6, 2017. Complainant alleges that this is abusive because the would-be victim did not consent to the complainant (*sic*). Complainant reports that this leads her to believe Accused intended to cause her unwarranted distress.

F. Allegation 6: Complainant alleges that on February 28, 2017, Accused openly commented to "numerous DDW staff" that Complainant had inappropriately revealed confidential information about Accused's reporting relationship implying that Complainant acted unprofessionally in revealing this information.

G. Allegation 7: Complainant alleges that Accused "intentionally spreads lies to harm her (Complainant's] professional reputation." She cites as examples that Accused told her supervisor, HR and other co-workers that Complainant "yelled at or admonished" Bernie Clark for assigning a well project to Accused. Complainant further alleges that Accused has countered Mr. Clark's denials of the allegation claiming that Complainant is forcing Mr. Clark to lie about it. Another example occurred in April 2017 where Accused suggested that Complainant was hindering his work in front of the division director. Complainant alleges that this is abusive because she had originally suggested the course of action Accused was now claiming she was working against.

IV. Accused Responses

A. **Allegation 1**: Accused denies making any threat or representation the he would file a criminal complaint regarding issuance of the *Intent to Discipline* issued on December 16, 2016.

B. **Allegation 2**: Accused acknowledges making the GRAMA requests. He explains that he did not limit the request to calls relating to the issuance of the Written Warning because he did not know the phone numbers of the two parties who made complaints against him.

C. **Allegation 3**: Accused acknowledges making the GRAMA request. He explains that he wanted to see if Complainant had made the same kinds of errors in her reports for which she (in part) had issued Accused a Written Warning.

D. **Allegation 4**: Accused denies threatening to bring forward information demonstrating Complainant's inadequate supervision of engineers and attributes Complainant's interpretation to a language barrier as English is Complainant's second language.

E. **Allegation 5**: Accused acknowledges making the complaint without consulting with the alleged victim at all.

end of page 2 of 9

F. **Allegation 6**: Accused explained that he was aware of the distribution of a new org chart but denies complaining about it to others.

G. **Allegation 7**: Accused explained that he and Complainant argued at length regarding the meaning of the term "admonished" and Accused said he did not budge from his characterization of Complainant's conversation with Mr. Clark. However, he denies discussing the matter outside of the directly involved parties. As to the April 2017 meeting, Accused denies accusing Complainant of hindering his work.

V. Witness Statements

A. Witness I (Marie Owens):

Ms. Owens reports that when she took the position as Director of DDW, Accused met with her and told her that everyone in his work group is incompetent and that his multivarious complaints are efforts to bring everyone up to his standard.

Ms. Owens reports that Accused is very open about his various complaints, GRAMA requests, etc. (*sic*) in the workplace. However, Ms. Owens notes the effect is that co-workers feel threatened by Accused's actions.

Ms. Owens explains that she believes section engineers take up to 50% more time than should be necessary performing their duties because they are afraid that Accused will review their work and submit complaints against their licenses with DOPL.

Ms. Owens states that there are other engineers (not just in DDW) who refuse to do surveys with Accused because they are afraid he will try to get their licenses revoked with his eagerness and enthusiasm for filing multivarious complaints. She also states that district engineers and even outside customer agencies have requested not to work with Accused because he is so difficult to work with.

B. Witness II (Bernie Clark):

Mr. Clark reports hearing Accused tell other co-workers that his change in supervision should have been kept confidential but notes that Accused was not unprofessional in the manner in which he expressed this opinion nor aggressive in asserting it to others.

Mr. Clark states that after he assigned a project to Accused in Complainant's absence that Complainant did talk to him and explain why she does not assign such projects to Accused. However, he disagrees with Accused's characterization of that conversation as an "admonishment." Mr. Clark also states that he is aware that Accused believes Complainant has pressured him to change his story about that conversation and states simply, "That is not true." Mr. Clark states that Complainant "did not yell at me or get angry in any way" and that Complainant "is a good manager" and he "does not appreciate [Accused's] attitude against her.

C. Witness III (Nathan Lunstad):

Mr. Lundstad states that he heard Accused express to co-workers that he believes the change in his supervision should have remained confidential.

Mr. Lunstad expects that his participation in this investigation will require him to testify in court and expresses fear of reprisal from Accused. He explains that his co-workers are aware of Accused's various complaints, labels Accused as "retaliatory" and believes that Accused, "wants to make everyone's life miserable."

end of page 3 of 9

Several days after his initial interview, Mr. Lunstad reached out to investigators by phone and inquired about how his name will be included in this report. He again expressed fear of reprisal but did not wish to change any of his statements.

D. Witness IV (Nagendra Dev):

Mr. Dev indicates that he heard Accused express that he believed his change in supervision should have remained confidential but noted that neither the tone nor language used were unprofessional.

E. Witness V (Michelle Watts):

Ms. Watts states that on Monday, December 19, 2016, Accused came to her office to inquire about the disciplinary process as it related to the *Intent to Discipline* he had received the previous Friday. She reports that he gave her a GRAMA request and asked about the procedures to file an abusive conduct complaint. Ms. Watts reports that Accused also inquired about filing a workplace harassment complaint and asked if she would be assigned to investigate such a complaint. Ms. Watts says she told him she did not know because of an impending reassignment. Ms. Watts states that Accused responded by saying she should not be involved because he had made an appointment with a police detective to file a criminal complaint about the delivery of the *Intent* document previously mentioned. Ms. Watts reports that she reiterated that she did not know who would be assigned to the investigation and that Accused reiterated his opinion that she should not be involved because he was filing a criminal complaint. Ms. Watts states that she asked Accused directly if he had filed the complaint and he said, "no" and that she told him that appropriate investigators would be assigned if and when a complaint is filed.

Ms. Watts explains that following this meeting she "closed her door and cried" because she was upset at the threat of a criminal complaint against her. She states that she told her husband, her supervisor (Dana Powers), Complainant and a deputy executive at DEQ about the threat.

F. Witness VI (Dana Powers):

Ms. Powers recalls Ms. Watts contacting her after meeting with Accused. She states that Ms. Watts told her about the threat of criminal complaint Accused has made. Ms. Powers explains that she then called and spoke with Bob Thompson about the matter because (*sic*) (1) Ms. Watts' concern about the complaint and (2) Accused's concerns about who would be involved with abusive conduct and/or workplace harassment investigations should they be necessary.

F. Witness VII (Bob Thompson):

Mr. Thompson recalls Ms. Powers contacting him and informing him about the reported threat of criminal complaint against Ms. Watts. He also recalls discussion about who would be assigned to investigate various potential complaints.

VI. Findings

A. Allegation 1: It is the opinion of the investigators that allegation 1 is substantiated. This finding is in spite of Accused's denial but based on witness statements and past behavior of Accused. The HR representative who heard the comment testified that she was upset enough to "close [her] door and cry" immediately after the comment and then promptly called her husband and supervisor to tell them what happened. She also documented the event in a Google doc the same day. Her supervisor also called the DHRM Enterprise labor relations team as they were unsure how or whether to respond to the threat. The Labor Relations Director recalls the discussion with the HR representative and her supervisor.

Furthermore, the HR representative's notes contain specific reference to Accused suggesting that she not be involved in investigating his anticipated abusive conduct complaint specifically because he was going to make a criminal complaint regarding the issuance of the *Intent*. Both the HR representative's supervisor and the Labor Relations Director recall discussing that claim as well.

Investigators note that all witnesses aside from the HR representative are providing second hand information. However, the contemporaneous documentation and disclosure to others along with the specificity of her notes grant credibility to the HR representative's report. In contrast, Accused's denial suffers for credibility because he has made criminal complaints against persons with whom he had professional disagreements on two different occasions.[1] Thus, investigators find the HR representative's report to have greater credibility and conclude that Accused did suggest that he already had or would be filing a criminal complaint regarding the issuance of the *Intent*.

B. Allegation 2: It is the opinion of the Investigators that allegation 2 is substantiated. This is based on testimony of both Complainant and Accused. Accused acknowledges the request itself and the wide scope. Accused's explanation (that he made the request with that scope because he didn't know the phone numbers of the persons whose calls were relevant to 'the Written Warning) is hollow. The individuals were known to him in the course of business and it would be unlikely that he would not have contact information for both. Furthermore, Accused placed a copy of his GRAMA request on Complainant's desk. This is not required by GRAMA as part of the request as Complainant would not even need to be aware that the agency is producing the phone records.

Given Accused's inadequate explanation of the scope of his GRAMA request and Accused taking the unusual step of notifying Complainant directly of the request allow a reasonable person to conclude that he used the GRAMA request to intimidate or cause unwarranted distress to Complainant.

C. Allegation 3: It is the opinion of the investigators that allegation 3 is substantiated. This is based on Accused's own admission and explanation. The question of whether Complainant ever made the same types of errors she claimed he had is irrelevant to the question of whether he actually made the errors. Because Accused is not Complainant's supervisor, even if he found errors in Complainant's work, he is limited to act within the agency and would only be able to make an external complaint to a regulatory agency.

In fact, Accused made a complaint to OSHA following his receipt of the Written Warning (and later the Written Reprimand) alleging violations of the Safe Drinking Water Act (SDWA). However, OSHA dismissed the complaint because the content did not "relate definitively and specifically to the subject matter" of the SDWA. The ALJ even went so far as to say Accused's complaint did not constitute protected activity because he failed to state a prima facia allegation under the SDWA.

Accused's reasoning asserts that if his supervisor had made similar errors or if he was sufficiently correct in his professional assessment of the water system that he could not be penalized for having made any error in the manner in which he interacted with his agency's customers. Neither claim withstands scrutiny as each actor is responsible only for his or her own behavior and performance. However, making baseless claims to defend one's self does not in and of itself constitute unprofessional or abusive conduct. The distinguishing factor here is that Accused took unreasonable steps in effort to vindicate himself by filing a substantively meritless OSHA complaint and not only making a GRAMA request for

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[1] Investigators do not know whether the two prior criminal complaints were actually filed but are taking Accused at his word as he disclosed having made the complaints in his grievance of November 14, 2016.

Complainant's work product but, placing a copy of that request on Complainant's desk.[2] Viewing the totality of the circumstance, investigators conclude that the number and type of actions coupled with Accused's acknowledgement of retaliatory animus would lead a reasonable person to determine that Accused intended to cause intimidation and unwarranted distress to Complainant.

D. Allegation 4: It is the opinion of investigators that allegation 4 is substantiated. This is based on a plain reading of the actual comments put into the performance evaluation in question and testimony of both parties.

At the core of this dispute (and most of Accused's complaints) is a difference of opinion about quality vs quantity of work. Accused focuses on quality alone as a matter of professional pride and obligation. Complainant would like to see his quantity or throughput increase. Accused responds to such efforts by claiming that others with higher volume must be sacrificing quality and endangering public health.

Complainant wrote in Accused's evaluation:

> *The plan reviews completed by Steve are very thorough and well documented. There is room for improvement regarding expectation #4 (follow up and follow through on assigned projects) as some projects are not responded (sic) within the expected time frame. Steve is exemplary in conducting field inspections and final inspections to make sure the facilities are constructed per approved conditions before issuing an Operating Permit.*

Accused wrote in response (in part):

> *My inference is that DDW management more favorably performance-evaluates engineering staff who rubber-stamp public works engineering designs, and less favorably performance-evaluates engineering staff who do due diligence in review of public works engineering designs.*
>
> ...
>
> *Also, failure as an engineering-licensed supervisor to exercise supervision of an employee [or] subordinate is unprofessional conduct under DOPL Rule R156-22. Therefore, DDW management should first be investigated to determine whether or not there is conscious, deliberate, under-supervision of new staff, and other junior staff, to leave them intentionally ill-prepared to review public works project designs, and intentionally ill-prepared to protect the public against water project design errors.*
>
> *Secondly, DDW management should be investigated to determine whether or not management's reason for taking away certain review assignments from me is to "shop" the assignments to other less-senior staff until DDW management can find a less discerning engineer with consequent briefer review time and more likely favorable review finding.*
>
> *Thirdly, DDW management should be investigated to determine whether or not certain categories of review assignments for illegitimate reason are not given to me and other*

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[2] These efforts were in addition to an EPA complaint and procedurally appropriate but unusually verbose grievances filed under U.C.A. 67-19a to challenge both the Written Warning and Written Reprimand.

experienced engineers. It should be determined whether or not DDW management excludes experienced engineers from review of certain projects because DDW management fears our raising of design flaw issues that junior engineers, ill-trained by DDW management, will not discern.

The Inclusion of these accusations in written form grants a great deal of credibility to Complainant's claim that the discussion in June 2016 included this content. Based on the weaker credibility of Accused (particularly with respect to allegation 1) relative to Complainant and the actual language placed in the evaluations by both parties, investigators find Complainant's report that Accused made the threats to be more credible than Accused's denial.

E. Allegation 5: It is the opinion of investigators that allegation is unsubstantiated. This is based on witness testimony from Accused and Complainant. Although Accused acknowledges making the complaint, the evidence does not indicate that Accused made any effort to alert Complainant of the complaint. As such, it is not reasonable to conclude that Accused intended intimidation, humiliation or unwarranted distress—especially in comparison to the GRAMA requests reviewed previously where Accused took the unusual and not required step of placing a copy of the request on Complainant's desk. Complainant argues that this is part of a pattern of unreasonable actions by Accused. Investigators agree that such an action is unusual; however, that alone does not support a finding of intent.

F. Allegation 6: It is the opinion of investigators that allegation 6 is unsubstantiated. This is based on witness testimony. As a factual matter, three witnesses indicated that Accused was unhappy about the distribution of the updated org chart showing Accused now reported directly to the Division Director and each indicated that Accused thought that change should have been kept confidential. However, as with allegation 5, this does not prove intent. Accused's reaction to and expectations regarding the new org chart are unusual,[3] but there is no indication that he made any effort to alert Complainant of his displeasure. Thus, although Accused engaged in the conduct Complainant described, investigators find insufficient evidence to support a finding of intent.

G. Allegation 7: It is the opinion of investigators that allegation 7 is unsubstantiated. This is based on witness testimony. On the matter of admonishing Mr. Clark, investigators find that this was a disagreement about characterization of events for which Accused was not present. However, for purposes of its investigation, there is no indication that Accused was trying to do anything other than defend his own interpretation of events. Similarly, the disagreement about Accused accusing Complainant of interfering with his work was again a self-defense action Accused felt he needed to take. One might quibble over whether either situation would be a battle worth fighting, but neither demonstrates that Accused acted with intent to intimidate or cause unwarranted distress.

VII. Conclusion

DHRM Rule R477-16-1(1) states that "Abusive conduct includes physical, verbal or nonverbal conduct, such as derogatory remarks, insults, or epithets made by an employee that a reasonable person would determine: (a) was intended to cause intimidation, humiliation, or unwarranted distress." Further, the rule

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[3] While supervisory reporting relationships are not listed as public records under GRAMA, it is difficult to imagine a scenario where such information would not be a matter of public record where an employee's performance plan (which normally identifies the supervisor by name) is explicitly public. Thus, an expectation that a change in supervision remain confidential is not consistent with normal workplace practices or public records law. Additionally, good function of work teams relies on knowing who is responsible for what and accountable to whom. Such knowledge is normally freely available to employees in the work unit to support efficient operation.

also states that "(3) Abusive conduct does not include: (a) appropriate disciplinary or administrative actions: (b) coaching or work-related feedback; (c) reasonable work assignments or job reassignments; or (d) reasonable differences in styles of management, communication, expression or opinion."

Accused asserts that each GRAMA request, OSHA complaint, EPA complaint and criminal complaint constitute legal actions for which he cannot suffer any penalty. Investigators acknowledge that generally such complaints may be freely filed. However, these protections are not absolute as such a policy would allow complaints to be weaponized by any employee against their employer. In this case, investigators find that Accused has employed these various complaints in just such a manner to cause intimidation and unwarranted distress to Complainant. The basis for this conclusion lies in the timing of the complaints, the nature of the complaints relative to the actual events and the effect evident in co-workers.

Timing

Accused noted in his performance evaluation in June 2016 the general flavor of complaints against Complainant and DDW management—that he was the only engineer giving due diligence to the work. Yet he failed to make a complaint to OSHA or file GRAMA requests to collect supporting documentation for his claims until after he received a Written Warning in October 2016. If his motives were indeed to "protect the public against water project design errors" then it is more likely he would have submitted his complaint as soon as he discovered the alleged problems rather than waiting until he received critical feedback on his own work and conduct.

Accused explained to investigators that the express purpose of one of the GRAMA requests was to attempt to show that Complainant had made errors in her work that would excuse alleged errors in his own work. Whether she made errors or not is irrelevant to whether he made errors so we must look elsewhere for the intent of his request. Complainant interpreted Accused's GRAMA request as an attempt to intimidate her and cause her unwarranted distress due to their scope and the fact that he provided her a copy of the request when there was no requirement to do so.

Investigators determine that a reasonable person would conclude that the timing of these events show that Accused made the OSHA complaint and GRAMA request with intent to cause intimidation and/or unwarranted distress to Complainant.

Nature of Complaints

The evidence shows that some of Accused's claims are objectively unreasonable. This includes criminal complaints made against water systems employees outside the agency who complained about Accused's attitude and communication, threatened criminal complaints against an HR representative over issuance of a disciplinary document and an OSHA complaint which OSHA itself says does not even constitute protected activity because it failed to articulate a basis on which relief could be granted.[4]

Additionally, Accused explains that he believes that a possible explanation for his receipt of a Written Reprimand is that it was an attempt by the AG's office to discredit him in anticipation of litigation about a water system he unfavorably reviewed 15 years ago. While irrelevant to the question at hand, this theory serves to illustrate the unreasonableness which typifies Accused's claims.

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[4] Investigators are aware that Accused has appealed OSHA's dismissal of his complaint. However, this does not preclude use of the adjudicator's opinion to help inform what a reasonable person may or may not determine about the intent of the complaint itself.

Investigators submit that the extreme mismatch between event and complaint inherent in each of these acts is self-evident to reasonable persons and that such reasonable persons would conclude that this mismatch is evidence that Accused engaged in these behaviors with intent to intimidate and cause unwarranted distress to Complainant.

Effect

The evidence shows that Accused regularly discloses to co-workers his various claims made to government entities and adjudicative bodies about multivarious perceived wrongs he believes he has suffered over the years. This includes open discussion about litigation Accused engaged against former employers and several complaints and lawsuits he has made against DEQ itself over the years. The Complainant refused to use email to send documentation to investigators during the investigation because the emails are subject to GRAMA and Accused would see them. Another called investigators days after their interview and reiterated the concerns of retaliation they raised during the interview itself. Finally, the Division Director explained that she believes the section engineers extra time reviewing projects due to fear of Accused making complaints to DOPL against their licenses. Investigators submit that a reasonable person would feel intimidated and distressed working under such conditions especially fearing to use one's own email account. Accused's open discussion in the workplace about his claims does not advance the claims but instead serves only to announce that Accused will not hesitate to make additional claims in the future, thus intentionally intimidating and causing unwarranted distress to his management and co-workers.

Summary

Taken as a whole, the evidence supports that Accused engaged in the conduct outlined in allegations 1-4 and that a reasonable person would find that he did so with intent to cause intimidation and unwarranted distress to management and co-workers generally and Complainant in particular. Therefore, it is the opinion of the investigators that Accused acted in violation of DHRM Rule R477-16.

ADDENDUM C

Exhibit 5

State of Utah
GARY R. HERBERT
Governor
SPENCER J. COX
Lieutenant Governor

Department of
Environmental Quality

Alan Matheson
Executive Director

Brad T Johnson
Deputy Director

L. Scott Baird
Deputy Director

October 23, 2017

Steven J. Onysko
2286 Doc Holliday Drive
Park City, UT 84060

RE: Final Agency Decision – Termination

Mr. Onysko,

On September 25, 2017, you received an email with a letter of termination. I informed you that day that the letter had been sent in error and was withdrawn so we could explore alternatives. Your counsel informed us on October 20, 2017 that you no longer wish to pursue settlement discussions. This letter constitutes my formal decision to terminate your employment with the Department of Environmental Quality effective October 23, 2017.

On July 10, 2017, you were issued a letter regarding Intent to Discipline—Dismissal for Just Cause and the Good of the Public Service by your supervisor Marie E. Owens, P.E., Director, Division of Drinking Water (the "Letter of Intent"). You subsequently requested an opportunity to be heard regarding the Letter of Intent. On August 1st, 2017, you met with me to discuss the Letter of Intent to Terminate. At the meeting, you were accompanied by Representative Tim Quinn who attended at your request. You also submitted 162 pages of documents and spent two hours arguing your case verbally.

I have reviewed and considered all the information you provided, investigated the issues you raised during our meeting, evaluated your arguments, and considered the contents of the Letter of Intent and DHRM Rule R477-11, including the grounds for termination, and the discretionary factors of R477-11-3. Following my review and analysis of these materials, I have concluded that there is adequate cause and reason to terminate your employment as Environmental Engineer III with the Department of Environmental Quality for the reasons set forth in the Letter of Intent.

My decision incorporates by reference the Letter of Intent, and is based on the following:

An independent investigation conducted during the spring of 2017 concluded that you had engaged in abusive conduct toward your then supervisor. The investigation substantiated that you threatened to bring a criminal complaint against your supervisor for issuing you an intent-to-discipline letter, an act authorized in Rules and Regulations, and properly within the purview of a

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supervisor. You made this threat in a conversation with an HR specialist which greatly aggrieved that employee. Threatening criminal charges in a disciplinary matter which provides procedural remedies is abusive conduct.

The investigation also substantiated your use of requests pursuant to the Utah Government Records Access and Management Act ("GRAMA") to intimidate your supervisor. Specifically, the investigator found that your broad request for all telephone records from your supervisor for a six-month period, and placing a copy of the GRAMA requests on your supervisor's desk were intended to intimidate and cause unwarranted stress to your supervisor, especially since GRAMA does not require that the target of the GRAMA request be informed of the request and because the request was far broader than your stated purpose.

The investigation further substantiated that following an intent-to-discipline letter issued to you by your former supervisor, you requested through GRAMA all sanitary survey reports ever completed by your supervisor, and again left a copy of the request on her desk. The investigator concluded that the GRAMA request, viewed in the context of a substantively meritless OSHA complaint you also filed against your supervisor, and the unnecessary placing of a copy of the request on her desk, coupled with your admission of retaliatory animus against your supervisor, all would lead a reasonable person to conclude that your actions were intended to cause intimidation and unwarranted stress to your supervisor.

Finally, the investigation concluded that you had threatened to accuse your former supervisor of professional misconduct and malfeasance during a performance review meeting if she did not change her evaluation of your work. This finding was supported by your own written response in the performance evaluation document. Threatening the professional license of your supervisor is abusive conduct.

The investigator also concluded that three other allegations were not substantiated for abusive conduct, though he concluded the alleged conduct did take place. My review of these allegations shows that they at least illustrate the disruptive nature of your behavior in your Division and your unjustified hostility and ill feelings toward your former supervisor.

During these proceedings, you have objected, both verbally in our meeting and in writing, to the issuance of a Written Warning in October 2016 and a Written Reprimand in December 2016. The time to grieve those actions passed long ago and this is not intended to reengage in that process. My review of the actions showed that they were substantively justified and reasonable, and procedurally correct. In addition, you were disciplined in 2006 and 2008 for conduct that was disruptive to the workplace, unprofessional, and damaging to morale. Indeed, you previously pursued a meritless OSHA complaint against your Division and former supervisor, alleging retaliation for reports of supposed violations of the Safe Drinking Water Act of 1974. You pursued these allegations all the way to the Tenth Circuit U.S. Court of Appeals, your claims being rejected and defeated at every level of review: by the Administrative Law Judge, by the United States Department of Labor Administrative Review Board, and by the Tenth Circuit U.S. Court of Appeals in 2013. Recently, you filed another similar OSHA complaint against your former supervisor alleging retaliation, a complaint the OSHA investigator has found meritless.

You have been on administrative leave with pay since June 12, 2017, pending the resolution of this disciplinary matter. During this period of time, both morale and production are up in the Division of Drinking Water. This is further evidence that your actions, behavior, and contentious dealings toward your supervisors and co-workers have been disruptive to your Division.

For the reasons outlined herein, and as described in the Letter of Intent to Discipline, I find good and just cause and reason that your employment be terminated for the good of the public service and the Department, effective October 23, 2017.

You have 20 working days to appeal this disciplinary action by DEQ to the Career Service Review Office (CSRO). You may submit this appeal in writing to the Administrator of the CSRO at 1120 State Office Building, SLC, UT 84114, by email at amorgan@utah.gov or by phone at (801-538-3048).

Dated this 23rd day of October, 2017

Alan Matheson
Executive Director, DEQ

ADDENDUM D

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW OFFICE

STEVEN J. ONYSKO, Grievant, v. UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY, Agency.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER** Case No. 2010 CSRO/HO 147 Hearing Officer Geoffrey Leonard

Career Service Review Office Hearing Officer Geoffrey Leonard (Hearing Officer) held a Step 4 evidentiary hearing in this case on July 17-19, September 10-12, and September 20, 2018. Agency Utah Department of Environmental Quality (Agency) was represented by Assistant Attorneys General Daniel Widdison and Alain Balmanno. Grievant Steven Onysko (Grievant) appeared *pro se*. A certified court reporter made a verbatim record of the proceedings. Witnesses[1] were placed under oath and examined, and testimony and documentary exhibits[2] were received into the record. At the conclusion of the hearing, the Hearing Officer directed the parties to make

[1] Agency's witnesses included: Ying-Ying Macauley; Michelle Watts; Bryan Embley; Marie Owens; and Alan Matheson. Grievant called as direct or rebuttal witnesses the following including: Ying-Ying Macauley; Dana Powers; Michelle Watts; Brad Johnson; Jenny Potter; Bernie Clark; Bob Thompson; Nagendra Dev; Shane Bekkemellom; Bill Laughlin; Alan Matheson; Cathy (Lewis) Moss; Bryan Embley; Kathleen Johnson; and Kim Dyches. For reasons set out herein, Grievant did not testify at the Step 4 hearing.

[2] The Hearing Officer admitted as evidence Agency exhibits: A-1, A-1, A-2, A-5, A-6, A-7, A-8, A-9, A-10, A-11, A-12, A-13, A-16, A-18, A-23, A-24, A-31, A-32, A-33, A-34, A-35, A-36, A-37, A-39, A-40, A-41, A-42, and A-43. The Hearing Officer admitted Grievant exhibits: G-112, G-113, G-114, G-117, G-118, G-119, G-123, G-128, G-130, G-131, G-133, G-136, G-139 G-141, G-146, G-147, G-149, G-154, G-158, G-175, G-255, 272, G-319, G-343, G-348, G-364, G-376 (first page only), G-380, G- 389, G-419 (pages 4, 7, and 13 only), G-422 (demonstrative purposes only), G-430, G-461 (first three pages only), G-467, G-486, G-489, and G-493.

additional submissions. The record was closed after those submissions were filed on October 8, 2018.[3]

AUTHORITY

The Career Service Review Office (Office) is authorized to hear and decide this case under *Utah Code Ann.* §67-19a-406 and *Utah Admin. Code* R137-1-1 *et seq.*

STATEMENT OF THE ISSUES

1. Is Agency's termination of Grievant's employment supported by just cause, or to advance the good of the public service?

2. Did Agency correctly apply relevant policies, rules, and statutes?

2. If not, what is the appropriate remedy?

SUBSIDIARY AND PROCEDURAL ISSUES

Before the start of the hearing proper, the parties argued Agency's July 9, 2018 *Motion to Dismiss Grievant's Claims Under the Utah Protection of Public Employees Act.* The Hearing Officer granted the Motion and dismissed all Grievant's claims of retaliatory action.

After Agency concluded its case in chief, Grievant moved for summary judgment in his favor, arguing that Agency had not carried its burden of proof. Construing the evidence introduced to that point in favor of Agency, the non-moving party, the Hearing Officer concluded that Agency had established a *prima facie* case supporting its decision to terminate Grievant and that disputed issues of relevant fact remained, and denied the motion.

During the Step 4 hearing, Grievant filed a *Motion to Compel the Attendance of his Designated Witness Nathan Lunstad.* At the hearing on September 12, 2018, the Hearing Officer denied this motion on the ground that Mr. Lunstad's anticipated testimony would be cumulative of

[3] The record was temporarily reopened to allow Grievant to file objections to the Agency's closing argument.

Grievant's and others' testimony, or would not be material, and on his determination that Mr. Lunstad's testimony would likely be unreliable.[4]

The parties filed numerous other motions and requests during and after the Step 4 hearing. Decisions on those motions were made by separate written order or on the record during the hearing.

Agency moved to seal a portion of the record relating to Marie Owen's testimony. The Hearing Officer granted that motion and has entered a separate order to that effect.

FINDINGS OF FACT

Based on the testimony of witnesses and on the exhibits accepted into evidence, the Hearing Officer makes the following findings of relevant and material fact.

1. At all times relevant to this proceeding, Agency Utah Department of Environmental Quality (DEQ) employed Grievant Steven Onysko as an Environmental Engineer III in DEQ's Division of Drinking Water (DDW).

2. At all times relevant to this proceeding, Grievant had career service status.

3. On July 12, 2006, Agency issued Grievant a *Memorandum of Written Warning* regarding his interpersonal skills with coworkers.[5]

4. On February 25, 2008, Agency issued Grievant a *Memorandum* warning him as to his inappropriate and unprofessional conduct in a February 15, 2008, incident in the DDW offices.[6]

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[4] Mr. Lunstad sent an email to the Office requesting that he not be called to testify as he believed Grievant would retaliate against him if his testimony was unfavorable. *See also* Hearing Exhibit A10, *Investigative Report*, pp. 3-4, where Mr. Lunstad is recorded as expressing concern that Grievant might retaliate against him for his participation in that investigation. Mr. Lundstad's email is not evidence and the Hearing Officer did not consider Mr. Lundstad's email in deciding this case.

[5] Exhibit A-31.

[6] Exhibit A-35.

5. On September 27, 2016, Grievant's supervisor, DDW Assistant Director Ying-Ying Macauley, completed an evaluation of Grievant's performance between July 1, 2015 and June 30, 2016.[7]

6. The evaluation rated Grievant's performance as "successful." However, Ms. Macauley noted that "there is room for improvement regarding expectation #4 (follow up and follow through on assigned projects) as some projects are not responded [sic] within the expected time frame."

7. Grievant believed that he deserved at least a "very successful" rating and that Ms. Macauley's "successful" rating was unfair.

8. In the "Employee Comment" section of the evaluation form, following Ms. Macauley's "room for improvement" observation, Grievant wrote:

> My inference is that DDW management more favorably performance-evaluates engineering staff who rubber-stamp public works engineering designs.
>
> * * *
>
> DDW management should first be investigated to determine whether or not there is conscious, deliberate under-supervision of new staff, and other junior staff, to leave them intentionally ill-prepared to review public works project designs, and intentionally ill-prepared to protect the public against water project design errors.
>
> Secondly, DDW management should be investigated to determine whether or not management's reasons for taking away certain review assignments from me is to "shop" the assignments to other less-senior staff until DDW management can find a less discerning engineer with consequent briefer review time and more likely favorable review finding.
>
> Thirdly, DDW management should be investigated to determine whether or not certain categories of review assignments for illegitimate reason are not given to me and other experienced engineers. It should be determined whether or not DDW management excludes experienced engineers from review of certain projects

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[7] Exhibit A-39.

because DDW management fears our raising of design flaw issues that junior engineers, ill trained by DDW management, will not discern.[8]

9. On October 17, 2016, Ms. Macauley issued Grievant a *Written Warning* based on complaints from Agency clients and Grievant's coworkers to the effect that they could not work efficiently with him.[9] Those complaints were generally directed to Grievant's communication style and demeanor.

10. The *Written Warning* included six separate directions as to Grievant's future conduct, directing Grievant to:

> Abide by all State, DEQ, and DDQ rules, policies, procedures, and business practices including but not limited to the DEQ Code of Conduct and the DDW Operating Principles.
>
> Demonstrate a customer service focused attitude geared toward collaborative assistance during all interactions with others at work. Use your professional knowledge to serve the public and present DDQ in a professional manner.
>
> Provide quality service to customers. Communicate in a positive and congenial way what is needed and helpful and how customers can best accomplish any changes needed to comply with DDW's requirements.
>
> Limit your work related actions to implementing requirements within DDW's authority. If there are any issues related to implementing or enforcing rules of other divisions and offices in State government, they shall be referred to the appropriate division or office.
>
> Stay within the scope and authority of DDW. Do not demand customers to provide information in formats you prefer, or demand information not required by DDW's rules.
>
> Do not threaten delayed processing if customers do not produce work in the format you prefer.[10]

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[8] Exhibit A-39.

[9] Exhibit A-16.

[10] Exhibit A-16.

11. On October 26, 2016, Grievant filed a complaint with the federal Occupational Safety and Health Administration (OSHA), under provisions of the Federal Safe Drinking Water Act, alleging that the *Written Warning* was retaliatory.

12. On November 14, 2016, Grievant grieved the *Written Warning*.

13. On November 14, 2016, Grievant filed a records request under GRAMA[11] seeking all of Ms. Macauley's telephone records for the preceding six months.

14. On December 16, 2016, Ms. Macauley issued Grievant a *Notice of Intent to Discipline - Written Reprimand.*[12] The *Notice of Intent - Written Reprimand* specifically related to a November 9, 2016 incident between Grievant and a non-DDW employee, during which Grievant became extremely upset and acted unprofessionally.

15. On December 16, 2016, Ms. Macauley and Department of Human Resources Management (DHRM) representative, Michelle Watts, met with Grievant at his workplace in an attempt to deliver the *Notice of Intent - Written Reprimand.*

16. Grievant became upset at that meeting and stated that he could not continue the meeting due to health reasons.

17. Grievant left the meeting and returned a short time later, stated he could not continue the meeting, and left.

18. Ms. Macauley and Ms. Watts left the *Notice of Intent - Written Reprimand* on Grievant's desk.

19. On the following Monday, December 19, 2016, Grievant met with Ms. Watts to discuss the *Notice of Intent - Written Reprimand.* In that meeting, Grievant told Ms. Watts that he

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[11] The Utah Government Records Access and Management Act, Utah Code Ann. §63G-2-101 *et seq*.

[12] Exhibit A-11.

was going to file a criminal complaint regarding the manner in which the *Notice of Intent - Written Reprimand* had been delivered to him on December 16, 2016.

20. On December 27, 2016, Grievant provided to Ms. Macauley a written response to the *Notice of Intent - Written Reprimand*, asserting that it did not specify the reasons underlying the intended discipline.[13]

21. On January 3, 2017, Grievant filed a GRAMA records request seeking all sanitary survey reports performed by Ms. Macauley.

22. On January 4, 2017, Ms. Macauley supplemented the December 16, 2016 *Notice of Intent - Written Reprimand*, providing additional information regarding the reasons for the proposed discipline.[14]

23. On January 4, 2017, Grievant filed an abusive conduct complaint against Ms. Macauley with DHRM. [15]

24. On January 13, 2017, Ms. Macauley issued Grievant a *Notice Imposing Discipline - Written Reprimand.*[16]

25. Grievant protested that the January 13, 2017 *Written Reprimand* did not include the mandatory notice of his appeal rights.

26. On January 18, 2017, Grievant delivered a copy of his abusive conduct complaint to Ms. Macauley.

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[13] Exhibit A-12.

[14] Exhibit A-13.

[15] Abusive conduct complaints are filed, investigated, and decided under Utah Admin. Code R477-16-1 *et seq.*

[16] Exhibit G-364.

27. On January 18, 2017, Ms. Macauley filed an abusive conduct complaint against Grievant. Ms. Macauley subsequently filed three amendments to her complaint on February 15th, April 12th, and April 20, 2017 (collectively the "abusive conduct complaint").

28. On January 23, 2017, Ms. Macauley issued Grievant a revised *Notice Imposing Discipline - Written Reprimand*, which was identical to the January 13, 2017 *Written Reprimand*, except that it contained a statement of Grievant's appeal rights.

29. On January 24, 2017, Grievant amended his pending OSHA complaint to include allegations that the December 2016 *Notice of Intent - Written Reprimand*, the circumstances surrounding the attempted December 2016 delivery of that *Notice*, and the January 2017 *Written Reprimand* were retaliatory.

30. On January 25, 2017, Grievant filed a grievance challenging the January 13, 2017 *Written Reprimand.*

31. On March 29, 2017, DEQ Executive Director Alan Matheson denied Grievant's grievance of the *Written Warning* and his grievance of the *Written Reprimand.*

32. On April 12, 2017, DHRM determined that Grievant's abusive conduct complaint against Ms. Macauley was unsubstantiated.

33. On May 22, 2017, DHRM issued an *Investigation Report* of its investigation of Ms. Macauley's abusive conduct complaint against Grievant.[17] The *Investigation Report* resolved Ms. Macauley's complaint into seven specific allegations:

> i. That Grievant, after receiving the December 16, 2016 *Written Reprimand*, told Ms. Watts that he intended to file a criminal complaint regarding the circumstances of the document's December 16, 2016 delivery.

[17] Exhibit A-10.

ii. That following the October 2016 *Written Warning*, Grievant filed multiple records requests under GRAMA for all of Ms. Macauley's telephone records over a six-month period, and that he left copies of the GRAMA requests on Ms. Macauley's desk.

iii. That following his receipt of the January 2017 *Written Reprimand*, Grievant made a records request under GRAMA for all sanitary survey reports done by Ms. Macauley, and again left a copy of the request on Ms. Macauley's desk.

iv. That Grievant's comments to the July 2016 evaluation threatened Ms. Macauley.

v. That on April 7, 2016, Grievant complained to another manager about Ms. Macauley's conduct in an April 6, 2016 meeting. Ms. Macauley asserted Grievant's conduct was abusive because the victim of the conduct did not consent to the complaint.

vi. That on February 28, 2017, Grievant commented to staff that Ms. Macauley had inappropriately revealed confidential information.

vii. That Grievant "intentionally spreads lies to harm [Ms. Macauley's] professional reputation."

34. The *Investigation Report* concluded that the conduct alleged in Allegations (i) through (iv) did occur and constituted abusive conduct and concluded that the conduct alleged in Allegations (v) through (vii) did occur but did not rise to the level of abusive conduct.[18]

35. No later than May 22, 2017, OSHA dismissed Grievant's complaint of retaliation under the Safe Drinking Water Act as not stating a claim under the Act.

36. On June 12, 2017, Agency placed Grievant on administrative leave with pay, pending Agency's review of the *Investigation Report* and other issues relating to Grievant's employment.

37. On July 10, 2017, DDW Director Marie Owens issued Grievant an *Intent to Discipline - Dismissal for Just Cause and the Good of the Public Service.*[19] Div. Dir. Owens based

[18] At the times relevant to this case, there was no procedure by which an employee could obtain review of the findings of an abusive conduct investigation. In 2018, the Legislature established a process for administrative review of the findings of abusive conduct investigations by the Office: that review procedure was not available until May 8, 2018, well after the complaints relevant to this case. Laws, Chapter 390, 2018 General Session.

her decision to recommend the termination of Grievant's employment on the findings of the *Investigation Report*, Grievant's previous disciplinary actions, and Div. Dir. Owens's conclusion that Grievant's actions were disruptive to the workplace.

38. On August 1, 2017, Grievant met with Executive Director Alan Matheson (Exec. Dir. Matheson) to discuss the *Intent to Discipline - Dismissal.* Grievant presented his side of the matters discussed in the *Intent to Discipline* and presented documents in support of his position.

39. On September 26, 2017, Grievant received a *Final Agency Decision - Termination.* Agency issued this notice in error and immediately withdrew it.

40. Grievant and Agency continued discussions of possible resolution, short of termination of employment, but those discussions ended by October 20, 2017.

41. On October 23, 2017, Exec. Dir. Matheson issued Grievant a *Final Agency Decision - Termination.*[20] The Agency's *Final Decision* specified the results of the *Investigation Report* as the basis of the decision to terminate Grievant's employment and incorporated the July 10, 2017 *Notice of Intent.*

42. On October 30, 2017, Grievant initiated this proceeding by filing a grievance form with the Office, specifying as the subject of grievance: 1) dismissal; and 2) numerous violations of rules adopted under Chapter 19 of the Utah State Personnel Management Act.

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[19] Exhibit A-2.

[20] Exhibit A-1.

DISCUSSION

I. BURDEN OF PROOF AND STANDARD OF PROOF

Agency has the burden of proving that good cause for termination exists and it must carry that burden by substantial evidence.[21] Substantial evidence "is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion."[22] "It is more than a mere 'scintilla' of evidence and something less than the weight of the evidence."[23]

II. GRIEVANT'S TESTIMONY

At his originally scheduled testimony in his case in chief, Grievant brought a binder of notes and documents to the witness table to use in testifying. The Hearing Officer asked Grievant to not use the documents in the binder while testifying.[24] After explanation and discussion, Grievant allowed the Hearing Officer to inspect his notes *in camera*. The Hearing Officer determined that the notes were Grievant's notes and work product, intended to guide Grievant's testimony,[25] with the exception of copies of several documents. The Hearing Officer directed Grievant to remove those documents, or identify, or provide copies of those documents to Agency,

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[21] Utah Code Ann. §67-19a-406(2)(a), (b).

[22] *Larson Limestone Co. v. State of Utah*, 903 P.2d 429, 430 (Utah 1995) quoting *First National Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990); *see also Grace Drilling v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989).

[23] *Johnson v. Board of Review of Industrial Comm=n*, 842 P.2d 910, 911 (Utah App. 1992).

[24] *See* Utah Rule Evid. 612(b): "An adverse party is entitled to have the writing [used to refresh the witness's recollection] produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record."

The Hearing Officer recognizes that the Utah Rules of Evidence do not apply to CSRO proceedings but believes the approach set out in the Rule ensures fairness to both parties and minimizes the possibility that inadmissible or unreliable evidence may be introduced into the record.

[25] The Hearing Officer did not read the notes or attempt to determine Grievant's strategy, thoughts, or intended testimony.

before testifying. Grievant refused. The Hearing Officer explained to Grievant the consequences of his refusal; Grievant reiterated his refusal and did not testify.

The Hearing Officer allowed Grievant a second opportunity to testify later in the hearing. Grievant refused to allow *in camera* inspection of notes from which he intended to testify, claiming they were protected work product[26] and that review would disclose his hearing strategy to the Hearing Officer. The Hearing Officer again explained that if Grievant did not testify, the record would contain little evidence in support of his case. Grievant nevertheless refused to allow inspection and did not testify.

At the conclusion of the hearing, the Hearing Officer directed Grievant to submit a proffer of the testimony he would have provided had he testified. Grievant submitted that proffer.[27] The Hearing Officer has reviewed this proffer, and generally accepts the facts asserted therein, but not arguments or conclusions, as true. Those facts do not contradict other testimony or evidence in any material way.

III. GRIEVANT'S *PRO SE* STATUS AND HIS CONDUCT OF THE HEARING

Grievant acted as his own attorney prior to and during the Step 4 hearing. Although a *pro se* litigant should be held to the same standards as a licensed attorney,[28] in view of the less-formal nature of administrative hearings and the potential serious consequences of this proceeding to

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[26] The Hearing Officer does not decide if Grievant's notes are in fact protected work product. *See Gold Standard, Inc., v. American Barrick Resources Corporation*, 805 P.2d 164 (Utah 1990). Regardless, *in camera* review of the documents would have precluded Agency from any knowledge of the documents other than those documents intended to refresh Grievant's recollection: the documents themselves would not be Grievant's work product.

[27] Grievant's September 26, 2018 *Grievant's September 20, 2018, Post Hearing Ordered . . . Proffer.* Notwithstanding clear direction that the proffer was to include only statements of fact and was to include no argument, Grievant used a considerable portion of the proffer to advance argument in support of his case.

[28] *Mower v. Moyer*, 2017 UT App 1888, ¶17, 405 P3d 978, 983, *cert. den.* 412 P3d 1255 (Utah App. 2017) (despite his *pro se* status Grievant "will be held to the same standard of knowledge and practice as any qualified member of the bar").

Grievant, the Hearing Officer allowed Grievant considerable leeway, explaining procedures and rulings, and allowing Grievant substantial latitude in his statements and pleadings.

The Step 4 hearing in this case was originally scheduled for three (3) days: at the close of those 3 days, Agency had not yet completed presentation of its case in chief. The Hearing Officer concluded that Grievant's conduct and presentation of his case played a large part in this lack of progress, and in order to expedite the progress of the hearing, ordered Grievant to testify first in his case in chief and limited Grievant's time to testify and to examine other witnesses.[29]

Notwithstanding that order and repeated reminders to expedite his case, Grievant insisted on continuing conduct that delayed the progress of the hearing. Grievant repeatedly tried to introduce evidence that had been excluded by previous rulings on motions in limine or by previous rulings by the Hearing Officer; for example, Grievant continued to pursue examination challenging the facts underlying prior disciplinary actions against him, even though such evidence had been excluded[30] and repeated objections thereto had been sustained. Grievant regularly reargued prior rulings on evidence, continued to argue issues after a ruling, and asserted that he did not understand the Hearing Officer's rulings, despite multiple explanations.

Grievant insisted on "preserving" issues for appeal by reciting a lengthy statement of preservation that often included argument on the point preserved or on his case in general. Grievant made over one hundred of these statements during the last four days of the Step 4 hearing, ranging from thirty seconds to almost two minutes in length. He continued this practice after the Hearing Officer stated several times that such statements were not necessary to preserve an issue, that making argument with those statements was inappropriate, and that his continued

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[29] July 27, 2018 *Order on Conduct of the Step 4 Hearing.*

[30] July 12, 2018 *Order on Motions in Limine.*

statements of preservation delayed the progress of the hearing and wasted his examination time. Nonetheless, Grievant insisted on continuing his conduct, stating, "[he] believe[s] his opinion is correct and the hearing officer's is not."[31] Grievant inefficiently used his examination time. Grievant asked multiple questions of many witnesses to establish what was essentially argument that he should have made in closing argument. Grievant consistently failed to establish a witness's knowledge, routinely leading to sustained objections on the basis of foundation or speculation. As noted, Grievant continued lines of questioning that had been ruled irrelevant or inappropriate.

Although some delay in the progress of the hearing may be reasonably be attributed to his *pro se* status, much of the delay was a direct result of Grievant's inefficient presentation of his case and his disregard of previous rulings, orders, explanations, and directions. Grievant was allowed more than sufficient time to present all evidence relevant to his case.

IV. GRIEVANT'S RECORD OF PRIOR DISCIPLINE

An employee's prior work record, including prior disciplinary actions, is relevant for the purpose of either mitigating or sustaining an agency's disciplinary decision.[32]

Agency disciplined Grievant on four occasions prior to the events leading to the decision to terminate:

> On July 12, 2006, Agency issued Grievant a *Memorandum of Written Warning* regarding his interpersonal skills with coworkers.
>
> On February 25, 2008, Agency issued Grievant a *Memorandum* warning him as to his inappropriate and unprofessional conduct in a February 15, 2008 incident in the Division of Drinking Water offices.
>
> On October 17, 2016, Agency issued Grievant a *Written Warning* based on complaints from Agency clients and Grievant's coworkers to the effect that they could not work efficiently with him generally directed to Grievant's communication style and demeanor.

[31] Tr.1772:24-25.
[32] R137-1-21(9).

On January 23, 2017, Agency issued Grievant a *Written Reprimand* related to a November 9, 2016, incident between Grievant and a non-DDW employee.

Although they concerned similar conduct to that underlying the termination, the 2006 and 2008 disciplinary actions were followed by an eight-year period without discipline and with evaluations of Grievant's performance as "successful" or above. The 2006 and 2008 disciplinary actions are too remote in time to be relevant to the termination of Grievant's employment, and the Hearing Officer gives them no weight in deciding this case.

The October 2016 and December 2016 disciplinary actions are close in time to the events leading to the termination and were imposed for conduct similar to that which was cause for the employment termination. The *Written Warning* included six specific directions to Grievant for improvement of his conduct that Grievant ultimately failed to follow.

Grievant argues no written reprimand exists; because the original January 13, 2017 *Written Reprimand* did not contain a notice of his appeal rights, he considers it to be "null and void."[33] Agency replaced the January 13, 2017 *Written Reprimand* with a January 23, 2017 *Written Reprimand* that was identical except for the addition of a notice of Grievant's appeal rights. Grievant argues that there is no evidence that he ever received the January 23, 2017 *Written Reprimand*; however, Ms. Watts of DHRM testified that she received a confirmation that Grievant received the email transmitting the *Written Reprimand* and that she had no reason to believe that Grievant did not receive the January 23, 2017 *Written Reprimand*. Grievant's conscious refusal or unconscious neglect in not opening the attachment to that email, or otherwise not following up on a reprimand that he was aware of, does not negate the existence and effect of the *Written Reprimand*.

[33] Grievant's "Proffer . . . .," ¶ 34.

Both the October 2016 *Written Warning* and January 2017 *Written Reprimand* are relevant to the termination of Grievant's employment.

V. ADEQUACY OF NOTICE TO GRIEVANT OF THE REASONS FOR TERMINATION

Grievant argues that Agency did not "notify [Grievant] in writing of the specific reasons for the proposed dismissal or demotion" as required by DHRM rule.[34]

Grievant did not receive a copy of the *Investigation Report* until after his employment was terminated. He argues that July 12, 2017 *Investigation Findings*[35] letter he received is inadequate notice, and emphasizes that its language is nonsensical on its face, and does not describe the alleged instances of abusive conduct. Grievant stresses the inconsistent use of terms "verbal" and "non-verbal" in different documents to refer to the alleged abusive conduct as confusing.

Undoubtedly, the July 12, 2017 letter stating that Grievant directed abusive conduct to himself makes little sense and does not describe the alleged abusive behavior. At various times, various Agency and DHRM documents did describe Grievant's conduct as both "verbal" and "nonverbal." However, Grievant received other notifications of the reasons for Agency's decision to terminate Grievant's employment.

In the July 2017 *Notice of Intent to Discipline – Termination*, Div. Dir. Owens specifically referred to Grievant's prior discipline in 2006, 2008, October 2016, and December 2016, and to the findings of the *Investigation Report*. Although she did not describe the allegations in the *Investigation Report* in detail, Div. Dir. Owens did refer to the filing of GRAMA requests, threats to file a police report, and threats to his supervisor over a performance evaluation. Div. Dir. Owens also referred to the disruptive effect of Grievant's conduct on the workplace and the performance of DDW.

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[34] Utah Admin. Code R477-11-2(2)(a).

[35] Exhibit G-430.

Grievant was sufficiently on notice as to the allegations underlying Div. Dir. Owens's decision to recommend termination of employment; in fact, during his August 1, 2017 meeting with Exec. Dir. Matheson, Grievant was able to present his reasons and arguments why his employment should not be terminated.

In the subsequent *Notice of Termination*, Exec. Dir. Matheson specifically cited as cause for his decision to terminate Grievant's employment, the four substantiated allegations of the DHRM *Investigation Report*. He described each of those allegations in detail. He stated that the three unsubstantiated allegations did occur and, although they did not reach the level of abusive conduct, illustrated the "disruptive nature" of Grievant's conduct. He referred to Grievant's previous discipline in 2006, 2008, October 2016, and December 2016, to a "meritless" OSHA complaint that Grievant had pursued against DDW and his former supervisor alleging retaliation, and to another OSHA complaint against his former supervisor alleging retaliation which was found to be meritless. He incorporated into the *Notice*, Div. Dir. Owens's *Notice of Intent to Discipline*, which also discussed the disruptive effect of Grievant's conduct on the workplace and DDW's relations with its customers.

There is no evidence that Grievant asked for clarification or amplification of any of these documents prior to this proceeding.

A reasonable person reading the *Notice of Intent* and the *Notice of Termination* would understand the reasons, including the specific instances of abusive conduct, for Agency's decision to terminate Grievant's employment.

Even assuming *arguendo* that Agency's pre-termination notice to Grievant was insufficient, Agency provided copies of the *Investigation Report and Findings* to Grievant as early as October 2017, and provided other relevant documents to Grievant during this proceeding.

Grievant has had a full opportunity to respond to those documents and to their contents and to cross-examine both the Report's author and the witnesses identified in the Report during the Step 4 hearing. Complete post-termination due process is sufficient to protect Grievant's due process rights to notice.[36] Grievant knew, or should have known, the nature of Agency's reasons for terminating his employment in sufficient detail and time to fully meet them, and had complete post-termination notice and due process here.

Grievant received adequate notice of Agency's charges against him.

VI. CAUSE TO TERMINATE GRIEVANT'S EMPLOYMENT

Agency based the decision to terminate Grievant's employment in large part on the findings of abusive conduct in the *Investigation Report*. Agency also relied on the repetitive nature of Grievant's conduct including prior discipline, the likelihood that Grievant's conduct would not improve the effect of Grievant's conduct on Division morale, the effect of Grievant's conduct on Division productivity, and Grievant's violation of DEQ and DDW policies.

Abusive Conduct

DHRM rule states that

> (1) Abusive conduct includes physical, verbal or nonverbal conduct, such as derogatory remarks, insults, or epithets made by an employee that a reasonable person would determine:
>
> (a) was intended to cause intimidation, humiliation, or unwarranted distress;
>
> (b) exploits a known physical or psychological disability; or
>
> (c) results in substantial physical or psychological harm caused by intimidation, humiliation or unwarranted distress.
>
> (2) The following actions do not constitute abusive conduct unless they are especially severe and egregious:
>
> (a) a single act;
>
> (b) appropriate disciplinary or administrative actions;
>
> (c) appropriate coaching or work-related feedback;
>
> (d) reasonable work assignments or job reassignments; or

[36] *Cleveland Board of Education v. Loudermill*, 470U.S.532, 547-48, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Lucas v. Murray City Civil Service Com'n*, 949 P.2d 746, 754 (Utah App. 1997).

(e) reasonable differences in styles of management, communication, expression, or opinion.

(3) An employee may be subject to discipline under this rule even if the conduct occurs outside of scheduled work time or work location.[37]

The Investigative Report concluded that Allegations (i) through (iv) of Ms. Macauley's abusive conduct complaint constituted abusive conduct under this standard and that Allegations (v) through (vii) did not constitute abusive conduct under this standard.

There is substantial evidence supporting the conclusion that the conduct alleged in each of the seven individual allegations did occur.

Allegation (i)

Grievant, immediately after receiving the December 16, 2016 *Written Reprimand*, told Ms. Watts that he intended to file a criminal complaint regarding the circumstances of the document's December 16th delivery. Although he did not specifically name Ms. Watts or Ms. Macauley, there is no doubt as to the intended target of this criminal complaint. Even assuming *arguendo* that a criminal complaint was appropriate, there was no need for Grievant to tell Ms. Watts of his intention. Both Ms. Watts and Ms. Macauley testified that Grievant's statement upset them and caused them "intimidation, humiliation or unwarranted distress." A reasonable person would react similarly. A reasonable person would also conclude that Grievant's statement was intended to cause them, and would cause them, "intimidation, humiliation, or unwarranted distress."

The conduct of Grievant here clearly constituted abusive conduct.

Allegation (ii)

After Ms. Macauley issued the October 2016 *Written Warning*, Grievant filed a GRAMA records request seeking all of Ms. Macauley's telephone records over a six-month period.

[37] Utah Admin. Code R477-16-1.

Grievant asserted to Mr. Embley, who investigated Ms. Macauley's abusive conduct complaint, that Grievant needed those records to prepare a defense to the *Written Warning* and that he requested all of Ms. Macauley's calls because he did not know the phone numbers of the individuals to which the *Written Warning* referred. Mr. Embley discounted this, reasoning that Grievant already knew the phone numbers of relevant parties, thus making a request for all calls unnecessary. Although the *Written Warning* was issued on October 17, 2016, Grievant did not file the GRAMA request until November 14, 2016, the same day he filed his grievance; this timing further discounts his explanation.

Grievant argues that he has a right, as a citizen, to request public records under statute. Such rights are not unlimited. Abusive conduct is defined not by its illegality, but by its intent or its effect on others; conduct may be technically legal, but still constitute abusive conduct.

Mr. Embley considered it significant that Grievant took the "unusual step" of placing a copy of the GRAMA request on Ms. Macauley's desk. Based on Agency counsel's statement in final argument that Ms. Macauley could not remember whether or not a copy of the request was left on her desk,[38] Grievant argues that Mr. Embley's conclusion is unsupported. Mr. Embley concluded, based on his contemporaneous interviews of Ms. Macauley and others, that it did occur. Grievant did not successfully impeach Mr. Embley's credentials or experience as an investigator and did not elicit evidence from Mr. Embley or others that would tend to lessen the credibility of his conclusion in this instance.

In his October 7, 2018 *Motion for Order of Hearing Mistrial*,[39] Grievant argued that Ms. Macauley's testimony, as summarized by Agency counsel, that she was not sure that Grievant

[38] *Agency's Closing Argument*, September 27, 2018, pg. 7.

[39] That Motion was denied. October 31, 2018 *Order on Motion for Mistrial.*

actually left a copy of a GRAMA request on her desk, was a last-minute change in Agency's allegations and conclusively proved that he did not leave anything on Ms. Macauley's desk. At most, the challenged testimony goes to the credibility of Ms. Macauley and, perhaps, the credibility of the *Investigation Report*.

Mr. Embley is an experienced investigator of workplace issues,[40] and the Hearing Officer gives particular weight to Mr. Embley's conclusions on this point, which were based on his interviews of witnesses including Ms. Macauley shortly after the events in question.

Grievant did not provide testimony, introduce any evidence, or proffer testimony tending to show that he did not leave the GRAMA requests on Ms. Macauley's desk.

Grievant did not address this issue in his lengthy examination of Ms. Macauley. The Hearing Officer infers from that omission that Grievant expected Ms. Macauley's testimony would corroborate Mr. Embley's conclusions. The Hearing Officer also notes that Grievant did not address the issue in his September 26, 2018 *Proffer*.

Ms. Macauley knew, no later than at least February 15, 2017, that Grievant had filed the GRAMA records requests.[41] Since normal procedures would not have required that Ms. Macauley be notified of the request at all, the Hearing Officer infers that Grievant notified Ms. Macauley, in one way or another, that the requests had been filed.

The Hearing Officer also gives weight to the evidence that Grievant had a history of filing, or threatening to file, actions against individuals with whom he disagreed or against their professional licenses. Ms. Macauley believed that Grievant was looking for "ammunition" to use

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[40] Grievant argues that because this was Mr. Embley's first abusive complaint investigation, his conclusions should be discounted. Mr. Embley had performed "about one hundred" investigations of other workplace issues prior to his investigation of Ms. Macauley's abusive conduct complaint, and his fact-finding expertise is not in doubt.

[41] The date of her second amendment to her abusive conduct complaint against Grievant: her final two amendments concerned other matters. *See* Grievant's Proffer, ¶¶31, 35, 40, and 42.

against her. She stated that Grievant's conduct towards her between September and December 2016 was "hostile."

The Hearing Officer concludes that Grievant did inform Ms. Macauley that the GRAMA requests were filed, and it is more likely than not that he did so by leaving a copy of the requests on her desk.

Even though Grievant's request was technically legitimate, the scope of the documents requested, the unnecessary notification of Ms. Macauley, and the unlikely explanation offered by Grievant, lead to the conclusion that Grievant intended to cause Ms. Macauley "intimidation, humiliation, or unwarranted distress." It is clear that Grievant's conduct did cause Ms. Macauley "intimidation, humiliation, or unwarranted distress."

Substantial evidence supports the conclusion here that Grievant's conduct constituted abusive conduct.

Allegation (iii)

Following his receipt of the January 13, 2017 *Written Reprimand*, Grievant made a records request under GRAMA for all sanitary survey reports done by Ms. Macauley. Grievant was not Ms. Macauley's supervisor and had no work-related reason to review her prior projects. He stated to Mr. Embley that he was seeking errors in Ms. Macauley's work similar to those which were the basis of the *Written Reprimand.*

The existence of such errors by Ms. Macauley would be irrelevant to the *Written Reprimand*; they would not excuse or balance out Grievant's conduct. Grievant had no other reason to obtain those documents.

As discussed above, it is more likely than not that Grievant left a copy of the request on Ms. Macauley's desk.

For the same reasons as discussed above, Grievant's conduct intended to cause Ms. Macauley, and did cause her, "intimidation, humiliation, or unwarranted distress."

Substantial evidence supports the conclusion that Grievant's conduct here constituted abusive conduct.

Allegation (iv)

Following an evaluation that he considered to be unfair, Grievant added the following comments in the employee comment section of the evaluation:

> My inference is that DDW management more favorably performance-evaluates engineering staff who rubber-stamp public works engineering designs.
>
> * **
>
> DDW management should first be investigated to determine whether or not there is conscious, deliberate under-supervision of new staff, and other junior staff, to leave them intentionally ill-prepared to review public works project designs, and intentionally ill-prepared to protect the public against water project design errors.
>
> Secondly, DDW management should be investigated to determine whether or not management's reasons for taking away certain review assignments from me is to "shop" the assignments to other less-senior staff until DDW management can find a less discerning engineer with consequent briefer review time and more likely favorable review finding.
>
> Thirdly, DDW management should be investigated to determine whether or not certain categories of review assignments for illegitimate reason are not given to me and other experienced engineers. It should be determined whether or not DDW management excludes experienced engineers from review of certain projects because DDW management fears our raising of design flaw issues that junior engineers, ill-trained by DDW management, will not discern.[42]

Grievant made similar comments in his meeting with Ms. Macauley discussing the evaluation. Although Grievant did not mention Ms. Macauley by name in his written comments, it is clear that the comments were directed at her. As Grievant's supervisor, she was the person who would receive the comments. The comments address the same specific issue she had indicated

[42] Exhibit A-39.

needed improvement and had discussed with Grievant. Ms. Macauley believed she was the target of Grievant's comments because she was the only person with the specific responsibilities discussed. She was offended by Grievant's remarks.

There is no question that Grievant's comments were highly inappropriate. Although Grievant argues he was only fulfilling his responsibility as a professional engineer to call attention to deficiencies, his comments clearly responded and reacted to Ms. Macauley's comments. They go far beyond any response to those comments that would be appropriate; Grievant alleged not inadvertent error or honest mistake, but intentional wrongdoing. There is no evidence that Grievant had tried to bring such issues to management's attention before, or after, the evaluation, even though a procedure by which an employee might report unlawful or unprofessional conduct existed. The lack of other similar statements to management outside of disciplinary proceedings is convincing evidence that Grievant had no legitimate reason to include the comments in the evaluation.

Whether Grievant's comments were "threatening" is a matter of semantics. Both objectively and subjectively there is no doubt that Grievant's comments would, and did, cause Ms. Macauley "intimidation, humiliation, or unwarranted distress."

Substantial evidence supports the conclusion that the conduct of Grievant here clearly constituted abusive conduct.

Allegations (v-vii)

The *Investigation Report* concluded that the conduct as described in Allegations (v) through (vii) did occur, but did not rise to the level of abusive conduct. The conduct described was cited by Agency as corroboration of Grievant's pattern of conduct, even though it was not substantiated as abusive conduct. The Hearing Officer concludes that the conduct described in

Allegations (v) through (vii) occurred, but there is insufficient evidence to determine whether it was abusive under DHRM rule. The Hearing Officer considers the conduct described in allegations (v) through (vii) as no more than corroboration of other evidence of Grievant's conduct.

Agency Policies

Agency asserts that Grievant's conduct violated the DEQ Policies and Procedures[43] and DDW Operating Principles.[44] Paragraph 1 of the Policies and Procedures require DEQ employees to "demonstrate support of the mission, vision and values of the Department of Environmental Quality. They shall abide by the department's operating principles, administrative laws, rules, workplace policies and procedures that govern their work or professional activities." Paragraph 6 requires DEQ employees to "not be insubordinate, disloyal or disrespectful to the orders of a supervisor or manager, unless such order is reasonably believed to be in violation of this policy, or other established policy, rule or statute." Paragraph 7 requires employees to communicate appropriately through body language, sound and tone of voice, and e-mail exchanges.

The DDW Operating Principles required employees to treat individuals with respect and professionalism in any conflict, to listen and try to understand the other person's point of view, and to creatively explore mutually agreeable solutions, to treat staff in a professional manner.[45]

Exec. Dir. Matheson concluded that Grievant violated the Policies and Procedures and the Operating Principles.

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[43] Exhibit A-5.

[44] Exhibit A-6.

[45] Grievant objected that Exhibit A-7 is not a copy of the current *Operating Principles* but did not introduce a different document. Grievant subsequently established that Agency's Mission Statement had changed, but did not establish that the other provisions were substantively different.

The conduct described in Allegations (i) through (iv) of the *Investigation Report* as well as Grievant's conduct affecting Agency customers, productivity, and morale violates these provisions of both the DEQ Policies and Procedures and the DDW Operating Principles.

Grievant's effect on DDW customers, productivity, and morale

Exec. Dir. Matheson testified that two Agency customers complained about working with Grievant, which he considered a negative impact on Agency's ability to perform its function. Div. Dir. Owens believed that the negative effect of Grievant's conduct on DDW productivity was substantial.

After Grievant was placed on administrative leave, Agency quickly cleared some of Grievant's projects that had languished for substantial periods of time. The evidence did not show why Grievant had not closed those projects, or what work to complete those projects was done after he left Agency.[46] Agency's evidence as to employee workload and productivity did not distinguish various projects by complexity or other factors that would support a conclusion that Grievant consistently spent too much time reviewing projects. Although Grievant did generally take more time to review projects, it is impossible to determine from the evidence the magnitude of that fact's effect on agency productivity, or whether that time spent was due to complexity of his assigned projects or other legitimate reasons.

Other DDW engineers were "on guard" against Grievant and regularly took extra time to over-document their work, which resulted in a loss of productivity. Although the evidence establishes that this did occur, the evidence does not establish the magnitude of the effect on Agency's overall productivity.

[46] Grievant argues that he took the time necessary to perform an adequate engineering review of each project. The evidence does not establish this was or was not the case.

Grievant entered coworkers' project files, despite not having review authority over those projects or any other legitimate need to do so. Coworkers were concerned that they would be the next target of Grievant's allegations of unprofessional conduct or violation of the professional engineers' code of ethics. Grievant's demeanor and conduct made it difficult for co-workers and customers to work collaboratively with him. The consensus of the witnesses was that Agency morale was poor, that the poor morale was due to Grievant's conduct, and that Agency productivity and morale improved after Grievant left Agency.

Ms. Macauley testified that Grievant's usual reaction to any criticism or disagreement was to threaten the other person's professional license.

Grievant's conduct throughout this proceeding also tends to corroborate the testimony of Agency's witnesses and supports Agency's assessment of Grievant's conduct and its effect on Agency.

On at least three occasions, Grievant objectively intimidated or unsettled a witness by referring to the Fifth Amendment, or to the fact that they were testifying under oath when there was no legitimate reason to use such a question to verify their truthfulness or credibility. In fact, Grievant's first question to witness Dana Powers was "do you understand that you have a right not to incriminate yourself under the Fifth Amendment?"[47]. Moreover, Grievant did this after being specifically directed that such questioning was inappropriate.[48]

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[47] Tr. 1136:6-8.

[48] Prior to the Step 4 hearing, Grievant sought an order requiring that before the testimony of each witness who is a licensed engineer or geologist, the Hearing Officer instruct the witness that "he or she has a right against self-incrimination in testimony in hearing before the [CSRO] and therein he or she may legally refuse to answer Agency or Grievant questions to the witness in hearing before the Office on those grounds." Grievant further sought an order allowing Grievant to ask each such witness "if he or she understands his or her rights against self-incrimination" and "if he or she fully understands that he or she has a right to refrain from answering any hearing question . . . that he or she believes could possibly cause his or her self-incrimination." Grievant argued that those witnesses may choose to testify in a manner that incriminates them as to violations of the *Engineering Code of Conduct*. The Hearing Officer denied the Motion as likely to inhibit or taint the testimony of those witnesses, and further directed Grievant if such an

In its May 22, 2018 *Motion to Compel*, Agency's counsel wrote that Grievant requested a stay of discovery "in part to avoid responding to the discovery requests." Agency's statement was a reasonable interpretation of the circumstances and unremarkable in argument to a motion to compel. However, instead of simply denying Agency's statement Grievant wrote:

> Grievant respectfully cautions Agency's Counsel that if he persists in scurrilous attacks on Grievant, Agency's Counsel will do so at peril of [sic] Utah Bar complaint by Grievant alleging unethical conduct by Agency's Counsel. Agency's Counsel has a history of his being known in Utah legal circles in general, and known to Grievant in particular, for being untethered to the truth [emphasis in original],[49] and Grievant will not abide unchallengingly by such conduct in Grievant's matters again.
>
> Grievant demands that Agency's Counsel retract his scurrilous allegation that Grievant requested a stay in discovery in this matter "in part to avoid responding to the discovery requests."[50]

Throughout the remainder of his Response, Grievant referred to Agency counsel's "willful deceit," "misrepresentation," "untruthfulness," and "vacuous, inane argument."

Grievant continued to allege professional misconduct and untruthfulness by Agency's counsel throughout this proceeding, including most recently in almost every point of his October 12, 2018 *Objection to Agency's October 8, 2018, 'Agency's Rebuttal Closing Statement.'*

Grievant's lack of courtesy and respect extended to the tribunal as well. At various times in this proceeding, Grievant stated that the Hearing Officer "shamelessly discounted written testimony" and "outrageously, dismissively stated . . . ;" [51] that this proceeding was "rife with

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instruction became necessary during the hearing, that he must ask for the witness to be excused before raising it. *See* July 23, 2018 *Pretrial Order*.

[49] Grievant did not provide, and has not yet provided, any evidence whatsoever in support of this remarkable accusation. The Hearing Officer was unacquainted with agency counsel Mr. Widdison prior to this case, but notes that throughout this proceeding, Mr. Widdison has acted as an honest, ethical, and capable member of the bar.

[50] Grievant's May 25, 2018 *Response to Agency's Motion to Compel Discovery*, pg. 2.

[51] Grievant's July 13, 2018 *Motion to Reconsider*, pg. 2.

judicial error," that the Hearing Officer's conduct was "illegitimate," and that the Hearing Officer's "specious argument" was "patently false and illegitimate;"[52] that "a reasonable person would infer poorly-veiled Hearing Officer bias," that "the Hearing Officer's gamesmanship [is intended] to disadvantage Grievant, which includes the Hearing Officer's flippant overruling of Grievant's objections with patronizing admonishment of Grievant," and that "Grievant is appalled that the Hearing Officer has abused his authority in concocting fake legal arguments with no foundation in recognized precedent."[53]

During the hearing, Grievant made multiple references to the certainty and outcome of his appeal if he did not prevail, including referring to "future reviews of this record;"[54] stating that "this immediate motion for mistrial will be reviewed by future decision-makers . . . for the hearing officer's conduct in response to this motion;"[55] stating that he had conferred with "people that I believe are extremely renowned in Utah and educated in the law, and I believe that my arguments are on very, very sound ground . . . ;"[56] stating that he had "personal conversations with multiple renowned attorneys, members of the Utah State Bar" in whose opinion the Hearing Officer had ruled incorrectly;[57] and insisting on making over one hundred time-wasting, unnecessary "statements of preservation of issue for appeal." A reasonable person would conclude, based on the frequency, vehemence, and gratuitous nature of these comments that they were intended to intimidate the Hearing Officer.

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[52] Grievant's August 5, 2018 *Motion for Order of Hearing Mistrial*, pg. 6, 11, 12.

[53] Grievant's August 27, 2018 *Motion for Reconsideration of July 27, 2018, 'Order on Conduct of the Step 4 Administrative Hearing' . . .*, pg. 3, 4, 6, 11.

[54] Tr. 1178:13-17.

[55] Tr. 1319:10-13.

[56] Tr. 1204:2-5. *See also* Tr. 1227:18:23.

[57] Tr. 1228:2-4.

Grievant regularly described any argument, opinion, or interpretation of fact or law or testimony contrary to his own as "false" or "dishonest."[58]

Grievant's conduct throughout this proceeding demonstrates that his preferred method to address a difference of opinion is to threaten, intimidate, belittle, and otherwise attack the other party. He consistently demonstrated a lack of courtesy and respect, and other conduct, that would make collaborative interaction with others impossible. Such conduct, which is objectively intimidating to others, would also tend to adversely affect the morale of coworkers and others. In exhibiting the same conduct towards the tribunal, he demonstrated a reasonable likelihood that this conduct would also extend to supervisors and superiors. If Grievant habitually indulged in such conduct in a formal proceeding intended to determine whether or not he returns to work for Agency, it is likely that he did no less in his everyday work environment. Grievant's conduct in the hearing thus tends to corroborate the testimony of Agency witnesses as to the disruptive, morale-breaking, and intimidating nature of Grievant's conduct.

Substantial evidence supports the conclusion that Grievant's conduct adversely affected Agency customers, productivity, and morale.

VIII. DECISION TO TERMINATE GRIEVANT'S EMPLOYMENT

Marie Owens, DDW director, testified that the findings of the *Investigation Report* were critical in her decision to recommend the termination of Grievant's employment. She also considered Grievant's effect on Department productivity, which she believed was substantial: she confirmed Grievant's conduct in conversations with staff. She also considered Grievant's prior discipline, including the 2006 and 2008 written warnings. Div. Dir. Owens testified that she decided to go directly to termination of employment, instead of demotion or suspension, because

[58] *See,* e. g., Grievant's October 4, 2018 *Closing Argument,* October 8, 2018 *Objections to Agency Closing Argument,* and October 12, 2018 *Objections to October 8, 2018 'Agency Rebuttal Closing Statement.'*

in her opinion the conduct described in the Investigation Report was sufficiently egregious, in light of Grievant's prior record, to justify termination. She believed that demotion or suspension would not protect staff from continuing abusive conduct: reassignment had already been tried without success.

Exec. Dir. Matheson, DEQ executive director, did not act on Div. Dir. Owens's recommendation for some time. Grievant and others met with Exec. Dir. Matheson on August 1, 2017, at which time Grievant presented his side of the case with relevant documents. The parties continued discussions to resolve the situation without a termination for some time. Exec. Dir. Matheson ultimately decided to accept the recommendation for termination of employment based on the severity of Grievant's conduct and the fact that previous attempts to work with Grievant resulted not only in no improvement, but in escalation of the abusive conduct. He concluded that the previous warnings had had no effect on Grievant's conduct. He considered Grievant's negative effect on Agency morale to be an aggravating factor. He considered a pattern of complaints about Grievant's "people skills" over a period of years, and the recurrence of the conduct, as significant factors. Exec. Dir. Matheson saw no "affirmative indication of willingness to recognize the impact of [Grievant's] conduct on the Agency and [his] coworkers and to suggest that there was a way that that behavior would change in the future."[59]

Several staff members had come to Exec. Dir. Matheson and told him something must be done about Grievant's conduct. Exec. Dir. Matheson heard complaints from customers and understood that morale was low. He spoke to those involved in the reprimand and the warning.

Grievant argues that his actions were not abusive and that he took no action that was not available to any member of the public, such as filing GRAMA requests, or available to any State employee, such as commenting on his evaluation or filing an abusive conduct complaint. He

[59] Tr. 1061:20-25.

argues that his disagreements with staff and management were no more than differences of professional opinion or were statements required by the professional engineer's code of ethics. He elicited testimony that there was no knowledge of any other employee being alleged with abusive conduct for similar actions.

Grievant's actions, while technically innocent, were taken in a context that renders them anything but innocent. Agency's allegations go not to what Grievant did, but the manner in which he did it.

Grievant argues that his professionalism must be defined by the engineer's code of conduct. He apparently does not recognize, or chooses to not follow, a general concept of professionalism. Exec. Dir. Matheson described this expectation as a standard of conduct requiring basing relationships with coworkers, courtesy, empathy, respect, and collaboration and good communication skills.

Agency also cited Grievant's filing of complaints of retaliation with OSHA and the fact that those complaints were deemed meritless. As Grievant argues, such filing in and of itself is not improper. There is no evidence as to whether those filings were well-taken or frivolous, or of their effect on Agency and its staff. The Hearing Officer therefore gives the fact of those filings no weight in reaching a decision.

The Office must ordinarily defer to the agency's judgment as to the level of discipline imposed.[60] In giving deference to the Agency's decision, the hearing officer is restricted to the standards he or she must apply and therefore cannot substitute his or her own judgment as to the propriety of discipline. "[T]he [Office] must give 'latitude and deference' to the Department's personnel actions. The [Office's] role in examining the Department's personnel actions is a limited

[60] Utah Admin. Code R137-1-21(3)(b).

one. The [Office] is restricted to determining whether there is factual support for the Department's charges against [a grievant] and, if so, whether the Department's sanction of dismissal is so disproportionate to those charges that it amounts to an abuse of discretion."[61] If there is substantial evidence to support an agency's decision as to discipline, the Office cannot set that decision aside unless termination is so unreasonable or disproportionate so as to constitute an abuse of discretion.

Agency's decision to terminate Grievant is supported by substantial evidence. As discussed below, it is not so unreasonable, inconsistent, or disproportionate to Grievant's conduct to be abuse of discretion.

IX. PROPORTIONALITY AND CONSISTENCY

Even if substantial evidence supports Agency's findings, the discipline imposed must be proportionate and consistent.

> When the CSRO hearing officer determines in accordance with the procedures set forth above that the evidentiary/step 4 factual findings support the allegations of the agency or the appointing authority, then the CSRO hearing officer must determine whether the agency's decision, including any disciplinary sanctions imposed, is excessive, disproportionate or otherwise constitutes an abuse of discretion. In making this latter determination, the CSRO hearing officer shall give deference to the decision of the agency or the appointing authority. If the CSRO hearing officer determines that the agency's penalty is excessive, disproportionate or constitutes an abuse of discretion, the CSRO hearing officer shall determine the appropriate remedy.[62]

Discipline is proportionate if it is appropriate to the severity of the underlying conduct: i.e., serious discipline should be reserved for serious misconduct. Discipline is consistent if similarly-situated individuals are treated in a similar manner: i.e., similar conduct should result in similar discipline. Discipline is an abuse of discretion if it "is clearly against the logic and the effect of such facts as are presented in support of the application, or against the reasonable and probable

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[61] *Career Service Review Board v. Utah Dept. of Corrections*, 942 P.2d 933, 942 (Utah 1997).
[62] Utah Admin. Code R137-1-21(3)(b).

deductions to be drawn from the facts disclosed upon the hearing."[63] Grievant "must, at a minimum, carry the burden of showing some meaningful disparity of treatment between [himself] and other similarly situated employees."[64] Grievant must compare his case to other disciplinary actions taken during the tenure of Exec. Dir. Matheson.

Agency imposed disciplinary actions on twelve employees during that time:

Employee 1:	Dismissal for abandonment of position
Employee 2:	Three-day suspension for inappropriate conduct during outside training
	Retirement in lieu of dismissal for inappropriate "rude" conduct with management during a conference call with an outside organization
Employee 3:	Written warning for misuse of State vehicles.
	Resignation after notice of intent to terminate for falsification of expense reports
Employee 4:	Administrative leave with pay; resignation in lieu of termination for unlawful harassment and inappropriate touching of coworker
Employee 5:	Termination for extended absence; not contested, employee now on long term disability
Employee 6:	Termination for extended absence currently pending; not expected to be contested; employee now on long-term disability
Employee 7:	Written warning for inappropriate email sent to reporter and "scathing" email sent to coworker.
	Written reprimand for becoming angry w/coworkers, using inappropriate language, and throwing mug against file cabinet.
Employee 8:	Written warning for inappropriate "combative and defensive" conduct with coworker

[63] *Tolman v. Salt Lake County Attorney*, 818 P.2d23, 26 (Utah Ct. App. 1991) (quotations and citations omitted).

[64] *Kelly v. Salt Lake City Civil Service Commission*, 2000 UT App 235 ¶ 30, 8 P.3d 1048 (Utah App. 2000).

Employee 9:	Written warning for lack of professionalism when interacting with coworkers
Employee 10:	Written warning for unprofessional conduct, acting in unprofessional manner; tone and body language were threatening and aggressive
Employee 11:	Informal counseling for using explicit language in personal phone call overheard by coworkers
	Written warning for using explicit language in personal phone calls overheard by coworkers, discussing topics regarding personal life that made coworkers uncomfortable
Employee 12:	Informal counseling for unprofessional conduct over disappointment at not being promoted
	Written warning after for talking to DDDW permittee about unhappiness as a DDW employee and ongoing job search[65]

The cases of Employees 2, 7, 8, 9, 10, and 12 are most comparable to Grievant: each involves unprofessional or inappropriate conduct towards coworkers or outside persons.[66]

In comparison to Grievant:

> Employee 2 was given a three-day suspension for inappropriate conduct during an outside training and was then terminated in February 2016 for inappropriate "rude" conduct during a conference call with an outside organization.
>
> Employee 7 was given a written warning for sending an inappropriate email to a reporter and sending a "scathing" email to a coworker and then was given a written reprimand in September 2015 for an incident in which he became angry with coworkers, used inappropriate language, and threw a mug against a file cabinet.
>
> Employee 8 was given a written warning in February 2016 for inappropriate "combative and defensive" conduct with a coworker.
>
> Employee 9 was given a written warning for lack of professionalism when interacting with coworkers

[65] Exs. A-40, A-42, A-43.

[66] Although Employee 4 was also dismissed for conduct similar to abusive conduct, that employee's conduct included physical touching; as Grievant was not alleged to have touched any person, that discipline is dissimilar to Grievant's case.

Employee 10 was given a written warning in November 2016 for unprofessional conduct, acting in unprofessional manner, and for tone and body language that were threatening and aggressive

Employee 12 was given informal counseling in June 2017 for unprofessional conduct over disappointment at not being promoted, and received a written warning in October 2017 after talking to a DDW permittee about their unhappiness as a DDW employee and ongoing job search.

The only terminated employee, Employee 2, was suspended before termination. Agency did not suspend Grievant after the *Written Reprimand*, but proceeded directly from the *Written Reprimand* to termination of employment. Div. Dir. Owens concluded that that in view of the nature of Grievant's conduct and the previous discipline, a suspension would not have protected staff from the adverse effects of Grievant's conduct. She believed that Grievant knew the rules and standards he must to meet, and that he was aware of his objectionable conduct and the effects it had on coworkers and Agency, and that he would not change that conduct. She feared that a suspension would have exposed staff to further abusive conduct by Grievant when he returned to work. A previous reassignment of Grievant had not resolved these issues.

Agency reasonably exercised its discretion to bypass the step of suspension and proceed directly to termination of employment. Agency had valid reasons to do so and its decision to do so was rational, logical, reasonable, and was not an abuse of discretion.

Employee 7 received a written warning and then a written reprimand, but has received no further discipline since September 2015. Employees 8, 9, 10, and 12 each received a written warning; Employees 8 and 10 were last disciplined over two years ago, and Employee 12 was last disciplined over one year ago.

Agency disciplined Grievant twice in four months, in October 2016 and January 2017, before finally recommending termination in July 2017. Agency's progression of discipline of

Grievant, including termination, was consistent with its prior discipline of other employees exhibiting similar conduct.

Agency set out several reasons why it concluded that termination of Grievant was appropriate. Termination for conduct such as Grievant is not unreasonable given Grievant's repetition of the conduct and its effect on the operations of Agency and on its staff.

The fact that Agency terminated the employment of other employees for more heinous conduct that was arguably criminal (such as falsifying expense reports and unwanted sexual touching) does not render termination for Grievant's conduct *per se* disproportionate. Termination is the maximum disciplinary action Agency can impose, and it may properly impose termination for a variety of conduct that may or may not constitute criminal conduct.

Other Agency employees also were involved in confrontational and/or heated discussions with coworkers during Grievant's tenure with Agency. However, those incidents were isolated incidents and opinion was mixed as to whether the conduct was inappropriate. Such conduct was not a continued practice by any individual and did not rise to the level and frequency of Grievant's conduct.

"Meaningful disparate treatment can only be found when similar factual circumstances led to a different result without explanation."[67] Agency terminated one other employee for inappropriate conduct that arguably had less adverse effect on Agency's operation that Grievant. Agency followed a course of progressive discipline through which Grievant did not show any prospect of improving his conduct, and which had demonstrated an adverse effect on Agency's operations and on its employees. Agency presented substantial evidence to support its decision to bypass the step of suspension in Grievant's case.

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[67] *Kelly*, 2000 UT App 235, ¶31.

Agency's decision to terminate Grievant was neither disproportionate nor inconsistent. The evidence supported Agency's decision to terminate. Decisions to terminate employment that are rational, logical, and reasonable withstand challenges of abuse of discretion. Agency's decision was not an abuse of its discretion.

X. RETALIATION

Prior to this proceeding, in July 2017, Grievant filed a separate grievance of retaliation against Agency with the Office.[68] That grievance alleged that Agency's June 12, 2017 action placing him on administrative leave and Agency's July 10, 2017 issue of the *Notice of Intent to Discipline - Dismissal* were both retaliatory. In November 201y, the Office dismissed that grievance for lack of jurisdiction.

Prior to the beginning of the Step 4 hearing here, Agency moved to dismiss any claim of retaliatory discharge by Grievant. Despite his earlier July 2017 grievance alleging retaliation, on his October 30, 2018 Grievance Form (the form for this proceeding), Grievant did not check the box marked "retaliatory action prohibited by the Utah Protection of Public Employees Act."[69] Additionally, Grievant affirmatively stated that he did not pursue a claim of retaliation in this proceeding.[70] The Hearing Officer therefore granted the Motion and dismissed all claims of retaliation prior to the Step 4 hearing.

Notwithstanding that ruling and his earlier representation that he was not pursing a claim of retaliation, throughout the hearing, Grievant continued to refer to retaliatory discharge and attempted to introduce evidence relating to retaliatory action. Grievant argued that such evidence

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[68] *Onysko v. Utah Department of Environmental Quality*, Case No. 2010 CSRO/HO 143. On the Grievance Form, Grievant checked the box for "retaliatory action prohibited by the Utah Protection of Public Employees Act."

[69] *See* Exhibit 2 to Agency's July 9 *Motion*.

[70] Tr. 21:13-20.

went to the credibility of witnesses, particularly Div. Dir. Owens. Grievant, at different times, argued the initiating event leading to the alleged retaliatory discharge was his filing of an abusive conduct complaint against Ms. Macauley, his allegations of engineering supervisory deficiencies in DDW, his stating his views as to perceived violations of the professional engineer's code of ethics, his filing of a retaliation complaint with OSHA, or his stating of his professional opinions that particular water systems were unsafe or flawed.

Ms. Macauley testified that she began working on her complaint against Grievant well before he filed his complaint and that the timing was coincidental. The Hearing Officer concludes that Ms. Macauley's filing of a complaint against Grievant was not retaliatory and that the filing of the complaint does not affect her credibility as to other matters.

Div. Dir. Owens testified that she based her decision to recommend termination of employment on the events chronicled in the *Investigation Report*, her discussions with staff, and the other reasons set out in her notice of intent. Even assuming *arguendo* her motivation is suspect for retaliatory bias, substantial evidence, independent of Div. Dir. Owens's testimony, establishes Grievant's conduct and its effect on Agency, and supports the conclusions of the *Investigation Report* that supported her decision to terminate Grievant. The testimony of other witnesses, as well as Grievant's own conduct during the Step 4 hearing, corroborated her testimony as to the effect of Grievant's conduct on Agency and its staff.

Exec. Dir. Matheson testified that he based his decision to terminate Grievant's employment on those same factors and his conclusion that Grievant's conduct had not improved following the *Written Warning* and *Written Reprimand.*

Grievant argued that the statement of Shane Bekkemellom[71] was falsely dated November 9, 2016, to predate the November 10th notice to Agency of Grievant's OSHA complaint alleging retaliation. Mr. Bekkemellom authored the memorandum on or about November 17, 2016 and he emailed the memorandum to Ms. Powers of DHRM on November 18, 2016. There is no evidence that Mr. Bekkemellom or Ms. Powers knew of the pending OSHA complaint at that time. There is no evidence that DEQ management asked Mr. Bekkemellom to author the memorandum. Importantly, there is no evidence that Grievant raised the issue of retaliation in his grievance of the *Written Warning* arising from that incident.

The evidence does not support Grievant's argument of retaliation. There is substantial evidence, independent of any retaliatory animus, to support Agency's finding of good cause to terminate Grievant's employment.[72] The termination was not retaliatory and any retaliatory motive that may have existed did not affect Agency's decision to terminate or any testimony given at the Step 4 hearing.

XII. OTHER ISSUES

Grievant advanced numerous arguments during the course of this proceeding, both in pleadings and during the Step 4 hearing. To the extent those arguments are not specifically addressed herein, the Hearing Officer has reviewed those arguments and concluded that they carry no weight in reaching this decision.

CONCLUSIONS OF LAW

1. Grievant properly invoked the jurisdiction of the Office to hear this case.

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[71] Exhibit A-14.

[72] *See, Dinger v. Department of Workforce Services*, UT App 59, 300 P.3d 313 (Utah App. 2013) (Administrative determination of just cause for termination and finding of no retaliatory discharge supported by substantial evidence).

2. Agency must prove, by substantial evidence, that it has correctly applied relevant policies, rules, and statutes.

3. Agency must prove, by substantial evidence, that good cause exists for terminating Grievant or that the termination advanced the public good.

4. Substantial evidence supports each of the seven allegations addressed by the Investigation Report.

5. Substantial evidence supports the finding that Grievant's conduct constituted abusive conduct.

6. Substantial evidence supports the finding that Grievant's conduct adversely affected Agency customers, productivity, and morale.

7. Grievant's conduct as described in Allegations 1 through 4 as addressed by the Investigative Report and as found in this Decision was abusive under DHRM rule.

8. Agency's decision to terminate Grievant was proportionate to the cited causes for termination.

9. Agency's decision to terminate Grievant was consistent with Agency's discipline for similar conduct by other Agency employees.

10. Agency's decision to terminate Grievant was supported by substantial evidence.

11. Agency's decision to terminate Grievant was not an abuse of its discretion.

12. Agency correctly applied all relevant policies, rules, and statutes.

13. Agency had good cause to terminate Grievant.

14. Agency's decision to terminate Grievant advanced the public good.

CONCLUSION

Agency's decision to terminate Grievant is therefore AFFIRMED.

DATED this 5th day of November 2018.

GEOFFREY LEONARD
CSRO Hearing Officer

RECONSIDERATION

Any request for reconsideration must be filed in writing with the Career Service Review Office within twenty days after the issue date of this decision. (Utah Code Annotated §63G-4-302)

JUDICIAL REVIEW

A party may petition for judicial review of this formal adjudication and final agency action pursuant to Utah Admin. Code R137-1-21(13) (14), and Utah Code Ann. § 63G-4-401 and 403, Utah Administrative Procedures Act

CERTIFICATE OF SERVICE

I certify that on this 5th day of November 2018, I caused to be emailed, the foregoing *Findings of Fact, Conclusions of Law, Decision and Order* in the matter of *Steven J. Onysko v. Utah Department of Environmental Quality,* Case No. 2010 CSRO/HO 147 to the following:

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ADDENDUM E

Department of Human Resource Management Individual Performance Plan and Evaluation

Name:	Steven Onysko	Agency:	480 Dept of Environmental Quality
Position:	ENVIRONMENTAL ENGINEER III - DDW	Unit/Division:	3821
EIN#:	127889	Work Location:	195 North 1950 West

Supervisor: YING-YING MACAULEY
Period Covered: 07/01/2015 to 06/30/2016
Overall Rating: 2 - Successful

Evaluation Date: 09/27/2016
Purpose: Annual

Agency Strategic Goal(s)

Team Strategic Goal(s)

Individual Strategic Goal(s)

1.Assure construction of safe and reliable drinking water infrastructure. Perform engineering review effectively. Follow the DDW Plan Review Protocol.

2. Complete the assigned sanitary surveys by December 31 of each calendar year. Comply with the Division protocols for conducting sanitary surveys.

3. Carry out the well grout witness assignment in accordance with Utah's requirements in Rule R309-515-6 as assigned.

4. Maintain and demonstrate professional expertise needed to perform the assigned responsibilities.

5. Assure alignment towards achieving Section, Division, and Department goals.

6. Provide technical assistance to the Engineering Section Manager for special assignments.

The Performance Evaluation for this period has been discussed by the employee and the supervisor.

I have discussed this performance evaluation with my supervisor YES 09/27/2016

Employee Comments: I deserve at least a "very successful" performance evaluation for Performance Year '15 - '16, and I fairly deserve an "excellent" performance evaluation. Mere "successful" performance evaluation for me in this 2016 Performance Review is unfair. I was uniformly evaluated in 6 of 6 categories at the highest evaluation, but that is merely "meets expectations," a value of "2." Yet, management's comments at goal #2, goal #4, and goal #6 describe "excellent" performance, a value of "4." And, goal #3 was not applicable in this performance year, yet I was saddled with nondescript "meets expectations," a value of "2."

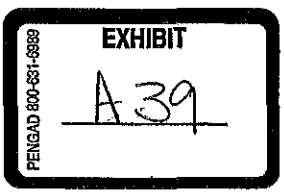
Unfairly, my overall performance rating is the average of 6 scores, "2" + "2" + "2" + "2" + "2" + "2."

Yet, management's comments, plus discounting the "not applicable" goal #3's inappropriate "2," argues for an overall performance rating being the average of:

5 scores: "2" + "4" + "N/A" + "4" + "2" + "4," which calculates to a 5 data-points average of 3.33, higher than "very successful" "3" rating.

I protest the unfairness of the UPM rating system.

I have discussed this performance evaluation with my employee YES 06/17/2016



Individual Performance Strategies For Rating Period

Expectations and Evaluation

1.Assure construction of safe and reliable drinking water infrastructure. Perform engineering review effectively. Follow the DDW Plan Review Protocol.

Expectation: 1. Perform engineering review effectively and efficiently.
2. Comply with the DDW Plan Review Protocol.
3. Update the WaterLink database with current project information. Review the WaterLink Plan Review Summary Report of the assigned projects assigned once a month as a minimum, and update WaterLink accordingly.
4. Follow up and follow through on assigned projects.
5. Close out assigned projects within 3 years, or update the WaterLink database with project status if the projects cannot be closed out.
6. Conduct the construction and final inspections as needed. Conduct inspections with appropriate safety gear and equipment.
7. Use the eDocs templates for engineering letters.

Strategy: Maintain familiarity with the:
a. State of Utah's Administrative Rules for Public Drinking Water Systems and good engineering practices,
b. DDW Plan Review Protocol (see the General Program Information/Policy and Procedures/Engineering folder in eDocs),
c. DDW Database Policies document (see the General Program Information/Policy and Procedures folder in eDocs),
d. WaterLink database,
e. SDWIS database, and
f. eDocs document management system.

Support Required: 1. Access to technical information and State and Federal regulations related to drinking water issues.
2. Training and technical support in the WaterLink, SDWIS, and eDocs.5
3. Training and technical support with gathering GPS data and entering location data into SDWIS.
4. Current contact information for local health departments and District Engineers.
5. Quarterly review with the supervisor regarding the status of assigned plan review projects.

Expected Outcome: The levels of performance stated in the aforementioned expectation and strategy portions constitute the minimum expected outcomes for a successful rating.

The following criteria will be used when considering an exceptional performance rating:

1. Perform assigned functions with extraordinary competence, as evidenced by efficiency in completing plan reviews, adding technical value to the project during the review process, and maintaining the balance between safeguarding the drinking water infrastructure, plan review productivity, and practicality.
2. Show observable evidence, such as the supervisor's observation, positive feedback from customers, and lack of customer complaints, indicating excellent customer service and positive perception of DDW's service and professionalism.
3. Conduct a plan review in a responsive, efficient, cost-effective, problem-solving, ethical, and professional manner.
4. Consistently apply DEQ operating and quality performance principles to accomplish Department and Division goals and objectives.
5. Display leadership, a positive attitude, teamwork, and initiative.
6. Identify process weaknesses. Improve program effectiveness and communication between staff, DDW Sections, DEQ Divisions, agencies, and the public.
7. Identify problems and devise creative, workable, and cost-effective solutions.

Actual Outcome: The plan reviews completed by Steve are very thorough and well documented. There is room for improvement regarding expectation #4 (follow up and follow through on assigned projects) as some projects are not responded within the expected time frame. Steve is exemplary in conducting field inspections and final inspections to make sure the facilities are constructed per approved conditions before issuing an Operating Permit.

Timetable: 06/30/2016

Achieved on: 06/17/2016

Results: Meets Expectations

Employee Comment: The comment, "There is room for improvement regarding expectation #4 (follow up and follow through on assigned projects) as some projects are not responded within the expected time frame," is unfair criticism of me.

Management states in its Goal #5 language, "Given the increasing workload and the difficulty in recruiting Professional Engineers, the plan review engineers need to adapt and find a way to complete the assigned work within the expected time frame."

Professional engineering statute, i.e., DOPL Rule R156-22, Professional Engineers & Professional Land Surveyors Licensing Act, precludes subordination of professional conduct to expediency. I reject that DDW management has authority to coerce me into professional negligence because DW management unsuccessfully recruits enough professional engineers. I will not be coerced into finding a way inconsistent with my professional code of conduct to complete the assigned work within an arbitrarily and capriciously designated "expected time frame," which has no consideration of protection of public health and welfare.

My inference is that DDW management more favorably performance-evaluates engineering staff who rubber-stamp public works engineering designs, and less favorably performance-evaluates engineering staff who do due diligence in review of public works engineering designs. My third-tier 2016 "successful" performance evaluation, relative to second-tier "very successful," and first-tier "excellent," accorded other DDW Engineering Section professional engineers, is retaliatory. It illegitimately disparages my professional engineering reputation, and denies me salary increases generally accorded only "excellent" and "very successful" evaluation tiers employees.

DOPL Rule R156-22, Professional Engineers ... Licensing Act Rule, states that unprofessional conduct by a registered engineer includes "failing, in the performance of services for clients, employers, and customers to be cognizant that the first and foremost responsibility is to the public welfare." Also, unprofessional conduct by a registered engineer includes "failing to hold paramount the duty to safeguard life, health, property and public welfare by approving and sealing only those design documents and surveys that conform to accepted engineering and surveying standards." The above-cited disparaging comment about me by management is retaliation for my refusal to engage in unprofessional engineering conduct.

Also, failure as an engineering-licensed supervisor to exercise supervision of an employee [or] subordinate is unprofessional conduct under DOPL Rule R156-22. Therefore, DDW management should first be investigated to determine whether or not there is conscious, deliberate under-supervision of new staff, and other junior staff, to leave them intentionally ill-prepared to review public works project designs, and intentionally ill-prepared to protect the public against water project design errors.

Secondly, DDW management should be investigated to determine whether or not management's reason for taking away certain review assignments from me is to "shop" the assignments to other less-senior staff until DDW management can find a less discerning engineer with consequent briefer review time and more likely favorable review finding.

Thirdly, DDW management should be investigated to determine whether or not certain categories of review assignments for illegitimate reason are not given to me and other experienced engineers. It should be determined whether or not DDW management excludes experienced engineers from review of certain projects because DDW management fears our raising of design flaw issues that junior engineers, ill-trained by DDW management, will not discern.

2. Complete the assigned sanitary surveys by December 31 of each calendar year. Comply with the Division protocols for conducting sanitary surveys.

Expectation:
1. Comply with the Division protocols for conducting sanitary surveys (see the General Program Information / Sanitary Survey folder in eDocs).
2. Attend the sanitary survey training every year prior to starting the sanitary surveys.
3. Complete and send the written report of each assigned sanitary survey to the water system within 30 days of completing the field inspection, or within 30 days of completing the last field inspection if more than one field inspection is needed to complete the survey.
4. Increase efficiency and minimize delay by requesting and gathering the needed information during the field inspection. If information cannot be obtained within the 30-day write-up time frame, complete the written report and note the issues.
5. Conduct a file search and understand the known deficiencies prior to the field inspection of each surveyed system.
6. Verify and update the SDWIS water system and facility records. Update the SDWIS database with the current activity status, status reason, facility information, and sufficient notes explaining changing the system/facility activity status.
7. Compile a summary list of the sanitary survey assignments, date of field inspection (or last field inspection), and date of mailing the written report to the water system, for management review.

Strategy:
1. Maintain familiarity with the current Division sanitary survey protocols.
2. Maintain familiarity with the Electronic Sanitary Survey (ESS) system and the Division's databases.
3. Keep records of the date of field inspection and the date of mailing the written report to the water system for the assigned surveys each calendar year.

Support Required:
1. Training related to sanitary surveys of water systems and/or water treatment plants.
2. Information of DDW sanitary survey protocols.
3. Training and technical support in the ESS program, the SDWIS & WaterLink databases, and eDocs.
4. Training and technical support in gathering GPS data and entering location data into SDWIS.
5. Current contact information for local health departments and District Engineers.

Expected Outcome: The levels of performance stated in the aforementioned expectation and strategy portions constitute the minimum expected outcomes for a successful rating.

The following criteria will be used when considering an exceptional performance rating:

1. Perform assigned functions with extraordinary competence, as evidenced by efficiency and accuracy in completing sanitary surveys, adding significant value to PWS or DDW operations as the outcome of the survey, and maintaining the balance between safeguarding the drinking water infrastructure, productivity, and practicality.
2. Show observable evidence, such as the supervisor's observation, positive feedback from customers and lack of customer complaints, indicating excellent customer service and positive perception of DDW's service and professionalism.
3. Conduct the sanitary surveys in an efficient, cost-effective, problem-solving, and professional manner.
4. Consistently use DEQ operating and quality performance principles to accomplish the Department and Division goals and objectives.
5. Display leadership, a positive attitude, teamwork, and initiative.
6. Identify process weaknesses. Improve program effectiveness and communication between staff, DDW Sections, DEQ Divisions, agencies, and the public.
7. Identify problems and devise creative, workable, and cost-effective solutions.

Actual Outcome: Steve completed all assigned surveys and complied with the protocols. Steve's sanitary survey reports are most thorough among staff. Steve's reports cover broad and in-depth information including the water system's plan review history, past issues, etc., and in many cases, include information beyond the scope and intent of sanitary survey. Other DDW staff has commented that every troubled water system in Utah should go through a Steve Onysko sanitary survey, which indicates and compliments the thoroughness of Steve's sanitary survey reports.

Timetable: 06/30/2016

Achieved on: 06/17/2016

Results: Meets Expectations

Employee Comment: I appreciate that DDW management acknowledges, "Steve completed all assigned surveys and complied with the protocols. Steve's sanitary survey reports are most thorough among staff." Yet, I am merely credited as "meets expectations" for being the very best staff performer in this goal category. How can an employee show basis for "very successful" or "excellent" performance rating if the individual goals have no higher outcome than "meets expectations?" The UPM system is unfair. Employee performance with respect to 6 goals can never average to "4" if the individual goal performance ratings are capped at no higher than "2."

3. Carry out the well grout witness assignment in accordance with Utah's requirements in Rule R309-515-6 as assigned.

Expectation: 1. Maintain familiarity with the technical knowledge and regulations related to the drinking water well grouting, including DDW's regulations and protocol for conducting well seal witness, and the Division of Water Rights' regulations.
2. Conduct well grout witness with appropriate equipment and safety gear. Request and gather the information needed to complete the well seal certificate during the field witness to increase efficiency and minimize delay.
3. Gather the billing information during the field witness. Provide the billing information of each well seal witness assignment to the Division accountant in a timely manner, as a minimum, no later than 7 days after field witness.
4. Prepare the well seal witness certification letter in accordance with the requirements of R309-515-6(5)(b)(iii). Forward the well seal certificate to the Division accountant in a timely manner, as a minimum, no later than 30 days of field witness. If necessary information cannot be obtained within the 30-day time frame, complete the well seal certificate draft and note the issues.
5. Compile a summary list of well seal witness assignments for each calendar year, date of field work, date of completing the well seal certification letter, and the date of providing billing information to the Division accountant.

Strategy: 1. Attend technical training and participate in field inspections related to well drilling and well grout witness.
2. Keep records of the date of field inspection, the date of completing the well seal certification letter, and the date of providing billing information to the Division accountant for the well grout witness assignments each calendar year.

Support Required: 1. Training related to conducting well grout witness and Division protocols.
2. Technical information of well drilling and well grouting.
3. Training and technical support in eDocs.
4. Training and technical support in gathering GPS data.

Expected Outcome: The levels of performance stated in the aforementioned expectation and strategy portions constitute the minimum expected outcomes for a successful rating.

The following criteria will be used when considering an exceptional performance rating:

1. Perform assigned functions with extraordinary competence, as evidenced by efficiency in completing well grout witness assignments, adding technical value, and maintaining the balance between safeguarding the drinking water infrastructure, productivity, and practicality.
2. Show observable evidence, such as the supervisor's observation, positive feedback from customers and lack of customer complaints, indicating excellent customer service and positive perception of DDW's service and professionalism.
3. Conduct well grout witness in an efficient, cost-effective, ethical, and professional manner.
4. Consistently use DEQ operating and quality performance principles to accomplish the Department and Division goals and objectives.
5. Identify process weaknesses. Improve program effectiveness and communication between staff, DDW Sections, DEQ Divisions, agencies, and the public.
6. Identify problems and devise creative, workable, and cost-effective solutions.

Actual Outcome: Steve did not receive any well seal witness assignment in the past year. This goal will be carried over to next year.

Timetable: 06/30/2016

Achieved on: 06/17/2016

Results: Meets Expectations

Employee Comment: The UPM system unfairly omits a "not applicable" choice for my supervisor vis-a-vis outcome.

The UPM system essentially forces a "2" rating to this 3rd of 6 goals. How can my 6-goal average ever reach "4" if I am burdened with a "2" rating on the #3 goal, which isn't even applicable this year?

The average of (#1 = ?) + (#2 = ?) + (#3 = "2") + (#4 = ?) + (#5 = ?) + (#6 = ?) can never be "4."

That is patently unfair.

4. Maintain and demonstrate professional expertise needed to perform the assigned responsibilities.

Expectation: 1. Maintain the professional registrations, licenses, and certificates required for your position.
2. Maintain knowledge of Utah's drinking water rules (R309), the well drilling portion of the water rights rules (R654), the federal drinking water regulations, the EPA technical documents, the AWWA standards, the APWA standards, and the ANSI/NSF standards, etc.
3. Deliver timely, courteous, and accurate technical assistance to internal and external customers. Demonstrate professional expertise, effective communication, and teamwork.
4. Attend or organize conferences, classes, training, and meetings related to drinking water issues.
5. As assigned, represent DDW in DEQ pre-design meetings, professional organization meetings, and inter-agency meetings, etc.
6. As assigned, provide technical training to internal and external customers, professional organizations, water systems, and consulting companies, etc.

Strategy: 1. Continue to expand engineering knowledge.
2. Obtain sufficient professional development hours (PDHs) or CEUs.
3. Renew PE license on time.

Support Required: 1. Attend technical training or conference related to engineering or drinking water issues.
2. Financial support for renewing professional engineer license on time.
3. Access to technical and regulatory information, e.g., design criteria, construction standards, federal and state regulations, guidance manuals, AWWA, APWA, and NFS standards, etc.

Expected Outcome: The levels of performance stated in the aforementioned expectation and strategy portions constitute the minimum expected outcomes for a successful rating.

The following criteria will be used when considering an exceptional performance rating:

1. Perform assigned functions with extraordinary competence. For example, provide technical assistance to a complex and challenging project that involves negotiation and collaboration with multiple parties, and achieve outstanding results.
2. Show observable evidence, such as the supervisor's observation, positive feedback from customers and lack of customer complaints, indicating excellent customer service and positive perception of DDW's service and professionalism.
3. Conduct meetings in an efficient, cost-effective, problem-solving, and professional manner.
4. Consistently use DEQ operating and quality performance principles to accomplish the Department and Division goals and objectives.
5. Display leadership, a positive attitude, teamwork, and initiative when representing the Division in meetings, conferences, and training sessions.

Actual Outcome: Steve represented DDW as a board member of the Water Conservation Forum throughout most of FY2016. [This role has been transferred to Camron Harry after June of 2016.] Steve attended the regular WCF meetings and participates in its events.

Steve represents DDW in many pre-design meetings facilitated by DEQ.

Timetable: 06/30/2016

Achieved on: 06/17/2016

Results: Meets Expectations

5. Assure alignment towards achieving Section, Division, and Department goals.

Expectation: 1. The following three documents are part of this performance plan: (1) DEQ's Operating Principles, Mission, Vision and Values, (2) DEQ's Code of Conduct, and (3) DDW's Operating Principles. The Division has the expectation that each employee will follow the tenets set forth in these three documents. Failure to follow them will result in an unsuccessful rating of this performance element as well as an overall unsuccessful rating of the employee's performance.
2. Familiarize yourself with DDW and Engineering Section goals. Assist DDW and the Engineering Section in meeting annual goals.
3. Assure timeliness and responsiveness to established deadlines and the priorities determined by the management. Prioritize the tasks, and if needed, communicate with management for re-prioritization.
4. Follow the established Division protocols.
5. Inform the Section Manager and Division Director of critical issues and deadlines. Notify the Section Manager and the Division Director of emergencies as soon as possible.
6. Communicate with internal and external customers in a responsive, effective, and courteous manner.
7. Notify local health departments and District Engineers of site visits within their jurisdictions, including sanitary surveys, construction or investigative inspections, and meetings.
8. Participate in the DDW and DEQ meetings to obtain the current knowledge needed to perform your duties.
9. Keep the DDW management and staff apprised of (1) your whereabouts and availability during office hours, (2) extended work-required absences from the normal work environment, and (3) leave schedule. Update the schedule in the DDW In-Out Board and Google Calendar information (including date, time, duration, location, and the nature of the event), and make your Google Calendar available to DDW staff to view your schedule.
10. Obtain prior approval from the Section Manager via email or phone call for pre-scheduled leave. Notify the Section Manager as soon as possible of unexpected leave. For extended leave, make arrangement to ensure communication, response, and adequate coverage for your assigned projects and responsibilities.

Strategy: 1. Provide clarity and sufficient details to help the other person understand what you try to convey.
2. Keep the customers, co-workers, and management informed in a timely manner even if their expectation may not be met within their preferred time frame.
3. Maintain familiarity with the established Division protocols. When in doubt, consult with the lead Division staff or management. When deviating from the Division protocols, document the reason and the solution for future reference.

Support Required: 1. Copies of (1) DEQ's Operating Principles, Mission, Vision and Values, (2) DEQ's Code of Conduct, and (3) DDW Operating Principles.
2. Access to copies of Division protocols.
3. Periodic review with the supervisor regarding the status of tasks and priorities assigned and DDW & Engineering Section annual goals.
4. Access to current contact information for local health departments and District Engineers.
5. Technical support of Google Calendar.

Expected Outcome: The levels of performance stated in the aforementioned expectation and strategy portions constitute the minimum expected outcomes for a successful rating.

The following criteria will be used when considering an exceptional performance rating:

1. Perform assigned functions with extraordinary competence, as evidenced by outstanding communication and coordination with internal and external customers, extraordinary efficiency in completing tasks, and meeting very challenging deadlines, etc.
2. Show observable evidence, such as the supervisor's observation, positive feedback from customers and lack of customer complaints, indicating excellent customer service and positive perception of DDW's service and professionalism.
3. Handling drinking water emergency events in a responsive, efficient, cost-effective, problem-solving and professional manner.
4. Consistently use DEQ operating and quality performance principles to accomplish the Department and Division goals and objectives.

Actual Outcome: One of the Division's and the Engineering Section's primary goals is to improve the efficiency of the plan review program. This goal applies to the program level and the individual plan review level. As a outcome of adapting to the increasing workload and the difficulty in recruiting Professional Engineers, the plan review engineers need to find a way to complete the assigned work within the expected time frame. Steve and other engineering staff are encouraged to examine how they currently process their work and explore/adapt different ways that are more effective and efficient.

Timetable: 06/30/2016

Achieved on: 06/17/2016

Results: Meets Expectations

Employee Comment: Management's performnance standard, "As a outcome of adapting to the increasing workload and the difficulty in recruiting Professional Engineers, the plan review engineers need to find a way to complete the assigned work within the expected time frame," is in conflict with Utah statutes that govern the Utah registered engineer profession.

6. Provide technical assistance to the Engineering Section Manager for special assignments.

Expectation: 1. Take the lead in plan review of engineering projects located in the assigned primary county or counties. Assist in the plan review of engineering projects located in the assigned secondary (backup) counties. On an as-needed basis, the assigned primary county (or counties) drinking water projects may be assigned to other DDW engineers for plan review. You may be assigned to the plan review projects that are not located in the assigned secondary (backup) counties.
2. Be the primary engineering representative in the assigned primary DDW institutional teams (except for the water systems located within the District Engineers' areas). Be the backup engineering representative in the institutional teams for the projects of the assigned secondary (backup) institutional teams.
3. Assist in conducting MPA sampling as needed. Follow the Division's MPA and UDI protocols (see the General Program Information / UDI folder in eDocs). Follow up with the MPA result and/or UDI determination notifications when the MPA result becomes available.
4. Maintain expertise and provide technical assistance on the assigned drinking water treatment process or technologies.
5. Develop understanding and expertise of the treatment process or technologies identified by the supervisor.

Strategy: 1. Participate in the meetings organized by the DDW institutional teams.
2. Occasionally, if the primary DDW Engineering representative for your assigned secondary institutional teams' drinking water projects is not available, you will participate in the institutional team meetings as the backup Engineering representative.
3. Coordinate with the Division staff in charge of MPA field gear and supply to obtain the field gear. Schedule the date of the MPA sampling with both the water system and the laboratory to ensure that the sample will be delivered and analyzed within the specified time frame. In some cases, if the terrain is difficult to navigate with field gear, request additional support from other Division staff. Collect and ship the MPA sample following the protocol.

Support Required: 1. Access to the "County & Plan Review Assignments" summary table (see attachment).
2. Access to electronic copies of Institutional Team protocol and documents (see attachment).
3. Current information for Local Health Department contacts.
4. Access to eDocs for information of current DDW protocols, templates, and practice related to MPA sampling and UDI sources.
5. Access to DDW's MPA sampling equipment, field gear, and supply.
6. Access to technical or regulatory information related to the assigned processes and regulations (such as design criteria or standards, federal and state regulations, guidance manuals, research reports, professional journals, etc.).
7. Opportunity to attend technical training or conference related to the assigned processes and regulations if the funding is available.

Expected Outcome: The levels of performance stated in the aforementioned expectation and strategy portions constitute the minimum expected outcomes for a successful rating.

The following criteria will be used when considering exceptional performance rating:

1. Perform assigned functions with extraordinary competence, as evidenced by outstanding technical expertise; significant improvement to the assigned tasks; maintaining the balance between safeguarding the drinking water infrastructure, plan review productivity, and practicality; etc.
2. Show observable evidence, such as the supervisor's observation, positive feedback from customers and lack of customer complaints, indicating excellent customer service and positive perception of DDW's service and professionalism.
3. Conduct a plan review in an efficient, cost-effective, problem-solving, and professional manner.
4. Consistently use DEQ operating and quality performance principles to accomplish the Department and Division goals and objectives.
5. Display leadership, a positive attitude, teamwork, and initiative.
6. Identify process weaknesses. Improve program effectiveness and communication between staff, DDW Sections, DEQ Divisions, agencies, and the public.
7. Identify problems and devise creative, workable, and cost-effective solutions.

Actual Outcome: Steve is experienced in MPA sampling and handles the MPA sampling independently. Because of Steve's extensive knowledge in water treatment and chemistry, many engineering staff frequently consult with Steve for technical assistance when they encounter questions during plan review. Steve is an excellent mentor to other engineers because of his knowledge, experience, and willingness to help.

Also, Steve worked in the past year with EPA's Office of Ground Water, EPA's National Risk Management Research Laboratory, EPA's Office of Pesticide Programs, and California's Division of Drinking Water, in his research of chloroisocyanurate disinfection implications for Utah public water systems. Steve's initiative, efforts and the outcome of his research lead to the development of DDW's plan review policy on di and trichlor installations.

Timetable: 06/30/2016

Achieved on: 06/17/2016

Results: Meets Expectations

Employee Comment: I appreciate management's acknowledgement that I established important collaborative working relationships in the past year with EPA's Office of Ground Water, EPA's National Risk Management Research Laboratory, EPA's Office of Pesticide Programs, and California's Division of Drinking Water, in my research of chlorocyanurate disinfection implications for Utah public water systems. I was instrumental in DDW's development of a policy document in this regard. I received an email of commendation for my efforts from DEQ's Executive Director, Alan Matheson.

I protest as unfair that UPM caps my supervisor's outcome on this, and every, goal as merely "Meets Expectations," a "2" rating.

Individual Performance Plan and Evaluation

Supervisor's Comments	Employee's Comments
Achievements and Strengths:	My Noteworthy Achievements +In the past performance year, I have excelled in sanitary survey assignments (goal #2), I have excelled in applying 40 years of unique environmental engineering and chemistry knowledge to completion of my assignments (goal #4), and I have excelled in providing technical assistance to public water systems (goal #6).
Additional Comments:	Support I need to improve my performance
Development Plans:	Additional Comments I deserve at least a "very successful" performance evaluation for Performance Year '15 - '16, and I fairly deserve an "excellent" performance evaluation. Mere "successful" performance evaluation for me in this 2016 Performance Review is unfair. I was uniformly evaluated in 6 of 6 categories at the highest evaluation, but that is merely "meets expectations," a value of "2." Yet, management's comments at goal #2, goal #4, and goal #6 describe "excellent" performance, a value of "4." And, goal #3 was not applicable in this performance year, yet I was saddled with nondescript "meets expectations," a value of "2." Unfairly, my overall performance rating is the average of 6 scores, "2" + "2" + "2" + "2" + "2" + "2." Yet, management's comments, plus discounting the "not applicable" goal #3's inappropriate "2," argues for an overall performance rating being the average of: 5 scores: "2" + "4" + "N/A" + "4" + "2" + "4," which calculates to a 5 data-points average of 3.33, higher than "very successful" "3" rating. I protest the unfairness of the UPM rating system.

Rating Explanation:
4. Exceptional
3. Highly Successful
2. Successful
1. Unsuccessful

Recommended Actions: Here is a clarification to Steve's comments below:
Steve commented to me during our performance evaluation meeting that I unfairly gave him only "Meets Expectations" results for each of the goals, and that I should have given him "Excellent" or "Exceptional" results for some of the goals. In response to his comments, I explained to him verbally that the UPM software only allows me two options - either "Meets Expectations" or "Does Not Meet Expectation," that the UPM software does not allow me to enter an "Excellent" or "Exceptional" result for each goal, and that the goals usually have "Meets Expectations" results for every one (not just for him). These explanations were given to Steve at two separate times before Steve entered his comments below.

Overall Rating: 2 - Successful

I have received a copy of this performance evaluaion and it has been discussed with me. I understand that my signature does not necessarily indicate agreement

Employee Signature: _____ **Date:** _____

Supervisor Signature: _____ **Date:** _____

Next Higher Level Management Signature: _____ **Date:** _____
(If required by the agency)